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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

R. L. PAYNE COMPANY, INC.,

Petitioner,

-vs-

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

Union members and the local union brought an action in state court alleging blacklisting in violation of a state statute and intentional infliction of emotional distress. The state court dismissed the complaint without prejudice and conditionally, finding it lacked subject matter jurisdiction to hear the blacklisting claim which cliam is within the exclusive jurisdiction of the National Labor Relations Board. The trial court acknowledged it had jurisdiction to entertain the claim for emotional distress which was alleged to have arisen out of the blacklisting. The court held that if the National Labor Relations Board found that blacklisting occurred, the second claim for intentional infliction of emotional distress could be refiled. The

Supreme Court of Montana reversed the trial court. The questions presented are:

(1) Whether a suit claiming damages for blacklisting, a state tort, may be maintained in a state court when the conduct constituting the blacklisting is arguably subject to section 7 or section 8 of the National Labor Relations Act.

(2) Whether "blacklisting" under Montana Code Annotated [hereinafter M.C.A.] sections 39-2-802 through 39-2-803 requires inquiry into conduct between employers and employees which is governed by the National Labor Relations Act.

(3) If the blacklisting was conducted for some purpose prohibited by the National Labor Relations Act, do state courts have subject matter jurisdiction to hear the case based on

public policy considerations outlined in Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290 (1977), and Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1967 (9th Cir. 1984).

LIST OF PARTIES

The other parties not listed in the caption are the Howard P. Foley Company and City Electric which were named as defendants in the trial court proceeding.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Petitioner R. L. Payne Company, Inc. respectfully prays that a writ of certiorari issue to review a final order of the Supreme Court of Montana ruling (a) a state district court has jurisdiction to hear a matter arguably subject to the National Labor Relations Act; (b) federal preemption does not exist in a case alleging blacklisting; and (c) that a lawsuit

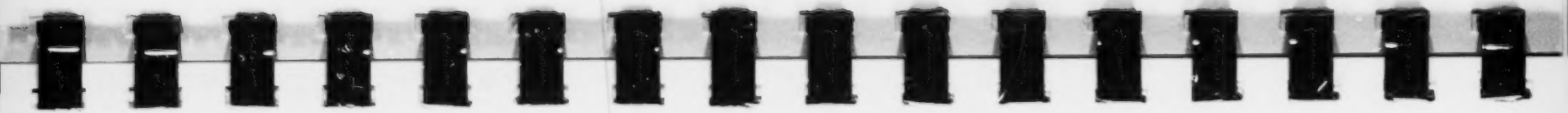
alleging blacklisting will not interfere with national labor policy.

OPINIONS BELOW

The opinion and order of the Supreme Court of Montana reversing the trial court's order dismissing the complaint for lack of subject matter jurisdiction appears in Appendix "B" to this petition and is reported at ____ Mont. ____, 714 P.2d 995 (1986). The opinion and order of the District Court for the Fourth Judicial District, Missoula County, appears at Appendix "C" and is unreported.

JURISDICTION

1. The judgment of the Supreme Court of Montana was entered February 13, 1986 (Appendix "B", infra, p. B-1). A timely petition for rehearing was denied on March 25, 1986. It is final by its terms.



2. The federal question was raised as indicated at pp. 4 and 5, infra. The excerpts from the record showing the raising of the federal question are set out in Appendix "D", infra, pp. D-20 and D-21; D-26 and D-27; D-68 through D-71.

3. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. section 1257(3), because a title, right, privilege or immunity was claimed under the constitution, statutes of, or commission held or authority exercised under, the United States, which claim was denied by the Supreme Court of Montana.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes involved are set forth in Appendix "A". They are 29 U.S.C. sections 157 and 158 (being sections 7 and 8 of the National Labor Relations Act).

STATEMENT OF THE CASE

The federal questions sought to be reviewed here were raised in the court of first instance (Fourth Judicial District, Missoula County) on March 19, 1984, and April 17, 1984, respectively, by Petitioner R. L. Payne Company, Inc. and City Electric's timely motions for summary judgment (Appendix "D", infra). In these motions, in addition to alleging that the union members were not "employees" of Petitioner as required under Montana's blacklisting

statutes, R. L. Payne Company, Inc. and City Electric averred:

> This Court lacks subject matter jurisdiction to hear this cause of action. . . .
>
> . . . Plaintiff members of IBEW Local Union 768 are covered by the National Labor Relations Act (NLRA), 29 U.S.C. section 152(5).

Appendix "D", infra, p. D-26.

> This state court lacks subject matter jurisdiction over labor matter disputes arising under the NLRA.

Appendix "D", infra, p. D-69.

The complaint (Appendix "E", infra) alleges violations of Montana's blacklisting law.

The trial court held that lack of subject matter jurisdiction over the blacklisting charge due to federal labor law preemption prevented it from reaching the merits of the motions for summary judgment. It pointed out that the facts alleged in the complaint, if

true, constitute an unfair labor practice under section 8 of the NLRA and held that:

> While it may be that the State of Montana has a legitimate interest in protecting citizens from the alleged blacklisting by enacting section 39-2-803 M.C.A. (1983), the controversy presented to the NLRB would be the same as the one presented to this court . . . but without the part of the cause of action concerning the intentional infliction of emotional distress. . . . The controversy at bar and the one that would be presented before the NLRB do not merely overlap edges, they are one in the same except that this court is additionally asked to entertain the claim of whether the plaintiffs suffered tortiously thereby. Therefore, this court risks significant interference with the federal regulatory scheme intended by Congress to be presided over and centrally administered by the Labor Board by considering now the merits of the claim of intentional infliction of emotional distress where the alleged blacklisting is so inseparably a part of the tort complained of without deference first to the jurisdiction of the NLRB for its consideration of the alleged blacklisting and invocation of its federal remedial authority if any is so

> found. This court is not willing to invade the province of the Labor Board by staging an inquiry into blacklisting. . .

Appendix "C", infra, pp. C-11 through C-14.

The trial court dismissed the complaint without prejudice and conditionally, finding it lacked subject matter jurisdiction to hear the blacklisting claim but acknowledged it had jurisdiction to entertain the claim for emotional distress which was alleged to have arisen out of the blacklisting. The court held that if the National Labor Relations Board found that blacklisting occurred, the second claim for intentional infliction of emotional distress could be refiled.

The union members appealed the trial court's decision to the Supreme Court of Montana. The Supreme Court of Montana reversed and remanded the

matter to state court. It held Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), to be controlling and declared, quoting Garibaldi:

> "A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The remedy is in tort, distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public--an interest which transcends the employment relationship. (Citation omitted.)" Garibaldi, 726 F.2d at 1375.

The act of blacklisting per se does not constitute an unfair labor practice. Blacklisting sounds in either (1) intentional infliction of mental or emotional distress or (2) tortious interference with prospective or present contractual relationships. However, in light of the provisions of section 39-2-803, M.C.A., blacklisting itself

> constitutes tortious conduct giving rise to a civil remedy. We therefore hold that federal preemption does not exist.

Appendix "B", infra, p. B-17 and B-18 (emphasis in original).

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Montana renders ineffectual the preemption doctrine as it relates to the jurisdiction of the National Labor Relations Board [hereinafter NLRB] in actions involving state torts. It is inconsistent with the decision of this Court in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), subsequently refined in Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290 (1977), and Sears Roebuck & Company v. San Diego County District Council of Carpenters,

436 U.S. 180 (1978), which sustained state court jurisdiction under certain circumstances. Those limited situations where state jurisdiction is allowed involve instances where the state tort is unrelated to employment discrimination or is a function of the particularly abusive manner in which the discrimination is accomplished and where the controversy presented to the state court is different from that which could have been presented to the NLRB. The opinion of the Supreme Court of Montana also threatens to create substantial disorder and confusion in subsequent cases involving federal preemption in the labor arena. The opinion below also conflicts with various decisions of the First and Second Circuit Courts of Appeal and misinterprets the rationale behind the Ninth Circuit's decision in Garibaldi

v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984). Finally, certiorari should be granted to resolve the recurring question of law whether blacklisting is or is not an unfair labor practice. A decision by this Court will end the conflict of decisions among the various courts in this land. A ruling on this question will reestablish uniformity of procedure for challenging alleged blacklisting conduct.

The state tort statutes in question read as follows:

> M.C.A. § 39-2-802. Protection of discharged employees. If any person, after having discharged an employee from his service, prevents or attempts to prevent by word or writing of any kind such discharged employee from obtaining employment with any other person, such person is punishable as provided in 39-2-804 and is liable in punitive damages to such discharged person, to be recovered by civil action. No person is prohibited from informing by word or

writing any person to whom such discharged person or employee has applied for employment a truthful statement of the reason for such discharge.

M.C.A. § 39-2-803. Blacklisting prohibited. If any company or corporation in this state authorizes or allows any of its agents to blacklist or any person does blacklist any discharged employee or attempts by word or writing or any other means whatever to prevent any discharged employee or any employee who may have voluntarily left the company's service from obtaining employment with another person, except as provided for in 39-2-802, such company or corporation or person is liable in punitive damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action, and is also punishable as provided in 39-2-804.

A. This Case is Inconsistent with Decisions of this Court.

The holding of the Montana Supreme Court is to the effect that a state's interest in protecting its citizens from blacklisting overrides the jurisdiction of the NLRB and the

state's tort law will be allowed to regulate the conduct in question. In other words, no federal preemption exists in a state tort cause of action for blacklisting even though the underlying reasons for the blacklisting may be an unfair labor practice.

The preemption doctrine defined by this Court in Garmon, Farmer and Sears makes allowances for state court actions in which the underlying conduct is not protected by the National Labor Relations Act [hereinafter NLRA]; the state has an overriding interest in protecting its citizenry from such conduct; and the state action does not interfere with national labor policy because the controversy presented to the state court is different from that which could have been presented to the NLRB. The allowances described above must be balanced with

this Court's other decisions which hold that states may not take action that fetters the exercise of rights by the federal act, Hill v. Florida, 325 U.S. 538 (1945), or constitute a counterpart to its regulatory scheme, International Union of United Automobile Workers v. O'Brien, 339 U.S. 454 (1950), or duplicates its remedies, Garner v. Teamsters Union, 356 U.S. 485 (1953).

The Montana Supreme Court opinion concentrates almost exclusively on one "exception" element identified above; i.e., the state's overriding interest in public policy, and fails to properly address the remaining three elements.

(1) Underlying conduct. The opinion of the Montana Supreme Court addresses the underlying conduct in this case by stating:

> In order for there to be a valid preemption in this case, we must find that blacklisting is protected by the NLRA. Section 7 of the NLRA, 29 U.S.C. section 157, relates to employee rights to self-organization, to bargain collectively and to engage in concerted activities for the purpose of bargaining collectively. The applicable provision, section 8, specifically 29 U.S.C. section 8(a) of the NLRA, define [sic] unfair labor practices as: restraining or coercing employees in exercise of section 7 rights; dominating or interfering with a union; discriminating in regard to hiring and tenure to encourage or discourage membership in unions; discharging or discriminating against an employee because he has filed charges or given testimony under the NLRA; refusing to bargain collectively. Nothing in the sections refers to blacklisting and clearly blacklisting would not be investigated by the Board unless the blacklisting was done for some purpose prohibited by the NLRA. Blacklisting for any purpose is unlawful in Montana.

Appendix "B", infra, pp. B-11 and B-12.

The opinion summarily determines that the underlying conduct and the

reasons therefor are neither important nor protected. However, the opinion conversely infers that if the reason for the blacklisting was to discriminate to encourage or discourage union membership, then the underlying conduct would also be an unfair labor practice. In this respect the opinion is confusing and inconsistent.

In addition, section 8(c) of the NLRA states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." This provision of the NLRA indicates that the alleged dissemination of information by Petitioner may

in fact be protected under the Act if such expression contains "no threat of reprisal or force or promise of benefit."

(2) Interference with national policy. In support of its position that the state action will not interfere with national labor policy, the Montana Supreme Court opinion states:

> Blacklisting per se is proscribed in Montana. The statute does not seek to regulate the relationship between the employer and the employee. Neither does the statute seek to regulate unfair labor practices treated in section 7 or section 8 of the NLRA, 29 U.S.C. sections 157 and 158.

Appendix "B", p. B-17.

Petitioner respectfully disagrees with the summary position taken by the Montana Supreme Court. The statute on its face regulates the relationship between employers and employees. Further, if the reasons behind the black-

list discriminate in regard to hiring and tenure, to encourage or discourage memberships in unions, or serves to discriminate against an employee because he has filed charges or given testimony under the NLRA, then certainly the statute seeks to regulate unfair labor practices.

State court damage awards for blacklisting should not be allowed because of the impact it will have on the purposes and objectives of the NLRA. One of the primary objectives of the NLRA was a uniform scheme of national labor regulation. By allowing a state remedy for conduct regulated by the Act, the consequences of violating provisions of the Act also governed by state tort laws will vary from state to state with the availability and elements of a given action. Further interference with

national labor policy will occur because Montana's blacklisting statute provides for punitive damages. The element of deterrence inherent in the imposition or availability of punitive damages for conduct that is an unfair labor practice makes such a recovery repugnant to the NLRA. This threat could render even those activities protected by the NLRA, i.e., section 8(c), too risky to undertake. By its deterrent effect, the imposition or availability of punitive damages for blacklisting serves a regulatory purpose paralleling that of the NLRA. It is this influence on the sensitive area of labor relations that the preemption doctrine was designed to avoid.

(3) The controversy is the same as that which would have been brought before the NLRB. The majority

opinion of the Montana Supreme Court summarily dismisses the final criteria set by this Court for evaluation of permitted state actions in an area generally within the exclusive jurisdiction of the NLRB.

> . . . clearly blacklisting would not be investigated by the Board unless the blacklisting was done for some purpose prohibited by the NLRA. Blacklisting for any purpose is unlawful in Montana . . . no one in the litigation contends that plaintiffs were blacklisted for labor-related activities. The reason for the blacklisting is unknown. Blacklisting per se is unlawful under Montana law, section 39-2-803 M.C.A.

Appendix "B", p. B-12 and B-13.

The state court will inquire into a controversy which is identical to that which could have been (and in this case was, see, Appendix "B", infra, p. B-22 and B-23) presented to the NLRB under an unfair labor charge. The state tort inquiry involves a

direct determination of the reasons for the discharge, not merely the manner in which the incident took place. A state court's exercise of jurisdiction in this situation involves a risk of interference with national labor policy and regulation.

Despite the trial court's clear expression and outline of the elements to be considered in determining over what matters it had subject matter jurisdiction and those which were beyond the scope of its jurisdiction, Justice Morrison, writing for the majority of the Montana Supreme Court, concluded otherwise Petitioner contends that the opinion of the trial court and that of Chief Justice Turnage and Justice Gulbrandson in their dissenting opinion more clearly address the criteria set forth by this Court. The trial court held and the

dissenting opinion of the Montana Supreme Court concurred that the state tort controversy involving blacklisting and that which was presented to the NLRB are one and the same. The claim for intentional infliction of emotional distress was found to be clearly within the jurisdiction of the state court. Justice Gulbrandson's dissenting opinion states as follows:

> Section 8 of the NLRA clearly prohibits employment discrimination, and blacklisting is recognized as an unfair labor practice.
>
> > "Further, as indicated by Mount Desert Island Hospital, [695 F.2d 634 (1st Cir. 1982)] and contrary to plaintiffs' state tort characterization, blacklisting has long been recognized as an unfair labor practice and, thus, prohibited by the act. See, NLRB v. Waumbec Mills, 114 F.2d 226, 232-33 (1st Cir. 1940); Cone Brothers Contracting Company, 135 NLRB 108 (1962). In short, at the least, plaintiffs' claim one is 'arguably subject to . . . the act' . . .

> [citation omitted] . . . and therefore come[s] within the primary jurisdiction of the . . . Board . . .' Abrams v. Carrier Corporation, 434 F.2d 1234, 1253 (2nd Cir. 1970), cert. denied, 401 U.S. 1009, 91 S.Ct. 1253, 28 L.Ed.2d 545 (1971) (emphasis in original)."

Campbell, supra, 592 F.Supp. at 1563. . . .

> I agree with the trial court's determination that the first issue to be decided is whether blacklisting occurred, and if so, for what reasons. That issue is arguably within the jurisdiction of the NLRB and the Board should be allowed to exercise its remedial authority if blacklisting activity is found. The trial court, in dismissing the cause conditionally without prejudice, clearly would entertain the plaintiffs' action in tort if the NLRB found that blacklisting occurred. I would affirm.

Appendix "B", infra, pp. B-21 through B-24.

B. The Montana Supreme Court Opinion Conflicts with Other Decisions Rendered by Various Federal Courts

Consideration by this Court is necessary on the grounds that the holding below conflicts squarely with NLRB v. Mount Desert Island Hospital, 695 F.2d 634, 642 (1st Cir. 1982); NLRB v. Waumbec Mills, 114 F.2d 226, 232-33 (1st Cir. 1940); Campbell v. McLean Trucking Company, 592 F.Supp. 1560, 1562-63 (E.D. N.Y. 1984); and Cone Brothers Contracting Company, 135 NLRB 108 (1962); and conflicts in substance with Abrams v. Carrier Corporation, 434 F.2d 1234, 1253 (2nd Cir. 1970), cert. denied, 401 U.S. 1009, 91 S.Ct. 1253, 28 L.Ed.2d 545 (1971). These cases stand for the proposition that blacklisting is recognized as an unfair labor practice and is thus prohibited by the National Labor Relations Act.

C. The Montana Supreme Court Holding Is Not in Accord with the Ninth Circuit Court of Appeals Decision in Garibaldi

In Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), the Ninth Circuit Court of Appeals emphasized that the claim made by Garibaldi "comports with the limitations of the Farmer holding. As in Farmer, Garibaldi's claim is a 'function of the . . . manner' in which the conduct was exercised 'rather than a function of the . . . [conduct] itself.' 430 U.S. at 305, 97 S.Ct. at 1066." Garibaldi, supra, at 1374. The Ninth Circuit reasoned it was not the claim of wrongful discharge itself but the claim the discharge was because he reported a shipment of adulterated milk to health officials that placed Garibaldi's claim in that limited area of state law cases which pose no

threat to national labor policy. Whistle blowing to health officials was the conduct California had an interest in protecting -- not protecting citizens from the discharge itself. Contrary to Garibaldi, in this case the Montana Supreme Court took the position that blacklisting per se or the conduct itself was of paramount interest to the state and would therefore be allowed to continue in state court. The Montana Supreme Court did not address the reasons for the blacklisting or the manner in which the blacklisting took place. The Ninth Circuit in Garibaldi found that California had a substantial interest in protecting its citizens from discharge for trying to protect public health. This controversy is separate from an inquiry the NLRB would make into a simple claim for wrongful termination.

The position of the Montana Supreme Court, however, is that the state has a substantial interest in protecting its citizens from employment interference under all circumstances and in all cases. The controversy presented to the state court and to the NLRB are one and the same. In fact, Justice Gulbrandson's dissenting opinion (Appendix "B", infra, p. B-23) quotes from a brief filed by the union members in which it was stated:

> When this case was presented to the Board, plaintiffs had to raise and prove to the Board that defendants' maintenance, circulation and other use of the blacklist was for the purpose of discriminating against plaintiffs for activites [sic] relating to self-organization, collective bargaining, concerted actions or union affilitations [sic]. 29 U.S.C. § 158(a)(1) and (3).

In the present case, the allegations made against Petitioner additionally includes a claim for inten-

tional infliction of emotional distress. The trial court properly determined that it had subject matter jurisdiction over this claim in the event the NLRB found blacklisting had in fact occurred. The trial court's articulation between those claims over which the state court retained jurisdiction and those claims which lay within the exclusive jurisdiction of the NLRB was correct. The Montana Supreme Court's opinion reversing that decision is in error and the opinion misinterprets the Garibaldi holding.

E. The Montana Supreme Court Opinion Threatens to Create Substantial Disorder and Confusion in Subsequent Cases Involving Federal Preemption in the Labor Arena

If the opinion of the Supreme Court of Montana is allowed to stand, all subsequent cases involving federal

preemption will suffer from the burden of its precedential dictates. Application of the "state interest" priority test to facts outside of blacklisting will undermine the vitality of the well-established preemption doctrine to such a degree that all state tort claims will override the exclusive jurisdiction of the National Labor Relations Board. State courts and federal district courts in Montana and elsewhere operating within the parameters of this decision will undoubtedly produce a wild array of opinions in an attempt to apply this decision to a gambit of state tort claims while meanwhile trying to harmonize the previous preemption guidelines set down by this Court, thus creating a mixed bag of case law in an area which properly belongs to the jurisdiction of the National Labor Relations Board.

F. The Federal Questions Herein Have Not Been Specifically Determined by this Court

The basic question in this case does not seem to have ever come before this Court. Prior cases before this Court which come closest to presenting a question similar to that in this case are Linn v. United Plant Guard Workers of America, 383 U.S. 53 (1966), and United Automobile Workers v. Russell, 356 U.S. 634 (1958). The petitioner in Linn filed a civil libel action under state law against an employee, a union, and two of its officers, alleging that statements in leaflets circulated in connection with a campaign to organize the employees, applied to him, were false, defamatory and libelous per se.

The instant case presents a different issue to this Court than

that presented in Linn. As this Court clearly stated in that decision:

> The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice.

Linn, at 63.

In the present case, blacklisting has been held to be an unfair labor in and of itself by a number of circuit courts of appeal.

In United Automobile Workers v. Russell, supra, a nonunion employee brought a common-law tort action in a state court against a labor union and its agent to recover compensatory and punitive damages for malicious interference with his lawful occupation, alleging that, by mass picketing and threats of violence during a strike, he was prevented from entering the plant where he worked and engaging in his employment. The employee

sought compensatory damages and punitive damages. This case is clearly distinguishable from the present case. This Court noted: "At the outset, we note that the union's activity in this case clearly was not protected by federal law." Russell, at p. 640. Petitioner believes that the conduct which the plaintiffs' below have alleged is blacklisting is in fact protected by section 8(c) of the NLRA. The concern for a conflict which this Court noted in Russell has come to pass in the present case.

> . . . we have been concerned lest one forum would enjoin as illegal, conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Acts.

Russell at 644.

Petitioner submits that the issue of blacklisting in the context of ju-

risdictional priority has not yet been addressed by this Court. This case presents a perfect opportunity to lay to rest the conflicts in opinion which are apparent in the materials quoted in this petition.

CONCLUSION

The impact of the Montana Supreme Court decision extends far beyond the harm to Petitioner arising from the prospect of further proceedings in a matter in litigation for over four years. The Montana Supreme Court opinion is in error. It disturbs the foundation of the federal preemption doctrine which this Court has painstakingly defined. If allowed to stand, the decision below will have a far-reaching impact on the conduct of state and federal court proceedings in Montana and elsewhere and is likely to result in virtual chaos of the proce-

dures which Congress intended to be used by the NLRB for expeditious resolution of labor issues before it.

Further, resolution of the issues involved in this petition will settle once and for all the jurisdictional mayhem created by claims of blacklisting.

The petition for certiorari should be granted. The error of the Montana Supreme Court is so clear Petitioner believes the appropriate relief would be a summary reversal of the decision.

DATED this 19th day of June, 1986.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing petition was duly served upon the following counsel of record by depositing said petition, postage prepaid, in the United States mail, this 21st day of June, 1986:

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APPENDIX "A"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. section 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

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29 U.S.C. section 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 USCS § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization: Provided, That nothing in this Act [29 USC §§ 151-158, 159-1681], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 USCS § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made and (ii)

unless following an election held as provided in section 9(e) [29 USCS § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues

and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [29 USCS §§ 151-158, 159-168];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS § 159(a)].

(b) It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or

retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly requested as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer; provided it is the representative of his employees subject to the provisions of section 9(a) [29 USCS § 159(a)];

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [sub-sec. (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling,

transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [29 USCS § 159]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees

under the provisions of section 9 [29 USCS § 159];

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is re-

quired to recognize under this Act [29 USCS § 151-158, 159-168]: Provided, further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including customers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to

be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act [29 USCS §§ 151-158, 159-168] any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act [29 USCS § 159(c)],

(B) where within the preceding twelve months a valid election under section

9(c) of this Act [29 USCS § 159(c)] has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) [29 USCS § 159(c)] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [29 USCS § 159(c)(1)] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate, and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising

the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

(c) The expressing of any views, arguments, or opinion, or the dissemination thereof whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [29 USCS §§ 151-158, 159-168], if such expres-

sion contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collec-

tively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the exis-

tence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or

ceased to be the representative of the employees subject to the provisions of section 9(a) [29 USCS § 159(a)], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended [29 USCS §§ 158, 159, 160],

but shall [sic] loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Ser-

vice under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter

containing such an agreement shall be such extent unenforceable [sic] and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) [subsec. (b)(4)(B) of this section] the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of

a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act [29 USCS §§ 151-158, 159-168] shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not estab-

lished, maintained, or assisted by any action defined in section 8(a) of this Act [subsec. (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [29 USCS § 159] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of this agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement

specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final priviso to section 8(a)(3) of this Act [subsec. (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for Clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [29 USCS § 159(c) or (e)].

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writ-

ing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act [subsec. (d) of this section]. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

APPENDIX "B"

NO. 84-499
IN THE SUPREME COURT OF THE STATE
OF MONTANA
1985

DALE MALQUIST, GEORGE BOHARSKI,
GEORGE BELT and LOCAL 768, IBEW,

Plaintiff and Appellant,

-vs-

HOWARD P. FOLEY, a District of
Columbia Corporation; CITY ELECTRIC,
a Montana Corporation, and R.L. PAYNE
COMPANY, INC., A Montana Corporation,

Defendants and Respondents.

APPEAL FROM: District Court of the
Fourth Judicial
District,
In and for the County
of Missoula,
The Honorable John S.
Henson, Judge
presiding.

COUNSEL OF RECORD:

For Appellant:

Terry Wallace argued, Missoula,
Montana

For Respondent:

Garlington, Lohn & Robinson; Charles E. McNeil argued, (Foley), Missoula, Montana

Corette, Smith, Pohlman & Allen; Lisa K. Swan argued, (City Electric), Butte, Montana

Milodragovich, Dale & Dye; Karl H. Boehm, (City Electric), Missoula, Montana

Worden, Thane & Haines; Stacey Weldele-Wade argued, (Payne), Missoula, Montana

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Submitted: December 10, 1985

Decided: February 13, 1986

Filed: FEB 13 1986

s/ Ethel M. Harrison
Clerk

Mr. Justice Frank B. Morrison, Jr. delivered the Opinion of the Court.

This is an appeal from an order of the Fourth Judicial District dismissing plaintiffs' complaint on the basis that the action was preempted by federal law and the State District Court lacked subject matter jurisdiction to adjudicate the controversy. We reverse and remand for trial.

This action was instituted by plaintiffs Dale Malquist, George Boharski, George Belt and Local 768, IBEW. No issue has been raised on appeal concerning standing of Local 768, IBEW, to prosecute this tort action and therefore all plaintiffs will be treated as one.

In 1979, Champion International, of Bonner, Montana, began construction of an expansion project on a packaging plant in Missoula County, Montana.

Champion hired Matthews, McCracken and Rutland (MM&R) of Baton Rouge, Louisiana, to do the general electrical contracting work. In March of 1980, MM&R, Howard P. Foley Company, City Electric and R. L. Payne, Inc., entered into a collective bargaining agreement with Local 768 of the International Brotherhood of Electrical Workers. Pursuant to the terms of the agreement signed by the parties, all electrical contractors on the project were to hire electricians through the Union referral books. Hiring could be from no other source unless labor was not available from the Union. Malquist, Boharski and Belt all placed their names in the referral book and were hired by MM&R until that company was terminated by Champion. At this time the three plaintiffs were laid off pursuant to a reduction in force

and placed their names in the referral book for future employment. Plaintiffs were referred to defendants for employment, but were refused.

In September of 1980, a meeting was held between Union officials and representatives of defendant employers. A Union business agent, Reg McMurdo, was shown a list of 20-30 names allegedly blacklisted from the project. Plaintiffs were blacklisted. Thereafter the Local filed a complaint under the collective bargaining agreement. The Labor-Management Committee deadlocked on the issues by a 6-6 vote, and the Union then dropped the complaint for the reason that the conduct complained of was not covered in the collective bargaining agreement, which only dealt with wages, hours and conditions of work.

Plaintiffs then filed claims in the State District Court for the willful and malicious blacklisting of the plaintiffs, seeking both compensatory damages and punitive damages. Two of the three defendants, R. L. Payne and City Electric, moved for summary judgment, alleging federal preemption. The District Court denied the motions for summary judgment, but dismissed the complaint, holding that blacklisting is arguably prohibited by the National Labor Relations Act (NLRA) and thus the State District Court lacked subject matter jurisdiction.

The issues presented on appeal are:

1. Whether plaintiffs' claim grounded in tort is preempted by the National Labor Relations Act, thereby denying the State District Court subject matter jurisdiction?

2. Whether plaintiffs failed to exhaust their administrative remedies?

3. Whether the action is barred by the statute of limitations?

Respondents place heavy reliance upon San Diego Building Trades Council v. Garmon (1959), 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775. In Garmon, supra, the United States Supreme Court established guidelines for determining respective jurisdictions of the National Labor Relations Board and the states in labor management relations. The Court said:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power

> asserted by Congress and requirements imposed by state law.

359 U.S. at 244, 79 S.Ct. at 779, 3 L.Ed.2d at 782.

In dismissing the complaint, the trial court placed emphasis upon the rule articulated by the Garmon court that the conduct need only be "arguably subject" to the NLRA. The language used by the Court in Garmon supports the trial court's position:

> . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

359 U.S. at 245, 79 S.Ct. at 780, 3 L.Ed.2d at 783.

Respondents acknowledge that two subsequent cases modified the Garmon approach. In Sears, Roebuck & Company v. San Diego County District Council

of Carpenters (1978), 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209, and Farmer v. United Brotherhood or Carpenters and Joiners of America, Local 25 (1977), 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338, the Supreme Court protected the states from federal preemption when the states were controlling conduct traditionally subject to state jurisdiction, especially where the state had a substantial interest in regulation of the conduct at issue and the state's interest was one that did not unduly interfere with federal regulation. The exception to federal preemption recognized by the United States Supreme Court has been primarily confined to a "violence" exception. Where the defendant's conduct may well have constituted an unfair labor practice but amounted to violence, the United States Supreme Court has decid-

ed that the state's interest in protecting its citizens from violence is sufficiently strong that the state's tort law will be allowed to regulate and punish such conduct. Farmer, 430 U.S. at 299, 97 S.Ct. at 1063, 51 L.Ed.2d at 349-350.

We do not find respondents' authority dispositive of the fact situation here at issue. Section 39-2-803, MCA, provides:

> Blacklisting Prohibited. If any company or corporation in this state authorizes or allows any of its agents to blacklist or any person does blacklist any discharged employee or attempts by word or writing or any other means whatever to prevent any discharged employee or any employee who may have voluntarily left the company's service from obtaining employment with another person . . . such company or corporation or person is liable in punitive damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action . . . .

The conduct proscribed by the state statute is "blacklisting" per se. There is no requirement that blacklisting be related to an unfair labor practice. If an employer blacklists an employee for any reason, that employer is subject to tort liability under § 39-2-803, MCA.

In order for there to be a valid preemption in this case, we must find that blacklisting is protected by the NLRA. Section 7 of the NLRA, 29 U.S.C. § 157, relates to employee rights to self-organization, to bargain collectively and to engage in concerted activities for the purpose of bargaining collectively. The applicable provisions of § 8, specifically 29 U.S.C. § 8(a) of the NLRA, define unfair labor practices as: restraining or coercing employees in exercise of § 7 rights; dominating or interfering with

a union; discriminating in regard to hiring and tenure to encourage or discourage membership in unions; discharging or discriminating against an employee because he has filed charges or given testimony under the NLRA; refusing to bargain collectively. Nothing in these sections refers to blacklisting and clearly blacklisting would not be investigated by the Board unless the blacklisting was done for some purpose prohibited by the NLRA. Blacklisting for any purpose is unlawful in Montana.

The District Court felt that it should not inquire into the reasons for the blacklisting because "arguably" blacklisting was subject to the NLRA's prescriptions. In its order the District Court said:

> This court is not willing to invade the province of the Labor Board by staging an inquiry into

> blacklisting, this supposed list of electricians who were allegedly disapproved of and subsequently boycotted for, as yet, unknown reasons when they sought employment with the defendants.

No one in this litigation contends that plaintiffs were blacklisted for labor-related activities. The reason for the blacklisting is unknown. Blacklisting per se is unlawful under Montana law, § 39-2-803, MCA.

Plaintiffs argue that preemption is not called for because:

1. The underlying conduct, blacklisting, is not protected under the NLRA;

2. There is an overriding state interest in protecting citizens from blacklisting and it's [sic] consequent harm. This interest has been manifested in a statute awarding punitive damages for blacklisting.

3. There is no risk that this cause of action, in tort, will affect national labor policy.

We find plaintiffs' argument compelling in light of the recent decision of the 9th Circuit Court of Appeals in Garibaldi v. Lucky Food Stores, Inc. (9th Cir. 1984), 726 F.2d 1367.

Garibaldi was employed by Lucky Food Stores as a truck driver until his discharge in October, 1980. Garibaldi filed an action in state court in California alleging he was wrongfully discharged for "whistle blowing." The case was removed to federal court and the Federal District Court held that his discharge was preempted by the National Labor Management Relations Act. The Circuit Court of Appeals reversed and established guidelines for preemption which allow

plaintiffs' claims in this case to go forward.

In Garibaldi, supra, the Ninth Circuit placed great emphasis upon a balancing of state and federal interests. The court quoted from the United States Supreme Court decision in Farmer, supra, wherein the Court stated:

> Our cases indicate, however, that inflexible application of the doctrine [of preemption in industrial relations] is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

Garibaldi, 726 F.2d at 1373, quoting Farmer, 430 U.S. at 302, S.Ct. at 1064, 51 L.Ed.2d at 351.

The Ninth Circuit acknowledged that the United States Supreme Court carefully tailored its holding to situations where the defendant's conduct

was outrageous and "particularly abusive." The Garibaldi court expanded the "violence" exception to embrace wrongful discharge conduct amounting only to a violation of California's public policy. While the discharge of Garibaldi may have constituted an unfair labor practice, yet it was significant that California had a paramount interest in regulating violations of public policy within its state. The court in Garibaldi, 726 F.2d at 1374, said:

> Thus, it is clear that California's interest in providing a cause of action for violation of public policy or a statute is the enforcement of the underlying statute or policy, not the regulation of the employment relationship.

Certiorari to the United States Supreme Court was denied at 105 S.Ct. 2319.

The case at bar is similar. Blacklisting per se is proscribed in Montana. The statute does not seek to regulate the relationship between the employer and the employee. Neither does the statute seek to regulate unfair labor practices treated in § 7 or § 8 of the NLRA, 29 U.S.C. §§ 157 and 158.

We find the rationale in Garibaldi to be persuasive and adopt it as the basis for our decision here. The court said:

> A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The remedy is in tort, distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public--an interest which transcends the employment relationship. (Citation omitted.)

Garibaldi, 726 F.2d at 1375.

The act of blacklisting per se does not constitute an unfair labor practice. Blacklisting sounds in either (1) intentional infliction of mental or emotional distress or (2) tortious interference with prospective or present contractual relationships. However, in light of the provisions of § 39-2-803, MCA, blacklisting itself constitutes tortious conduct giving rise to a civil remedy. We therefore hold that federal preemption does not exist.

There is not an exhaustion question in this case. Administrative remedies are in the federal system. We here have an action grounded in tort under state law. The conduct complained of is, as we have held, not subject to NLRA proscription. The tortious conduct complained of in

state court has no exhaustion component.

Our holding that plaintiffs' claim constitutes a tort under state law requires the application of the three year statute of limitations applicable to tort actions in Montana, § 27-2-204, MCA. Because no specific statute of limitations is provided under state law for blacklisting, the tort of blacklisting is covered by the general tort statute of limitations and of course the same would be true for actions grounded in intentional infliction of mental distress and tortious interference with contractual relationships. This cause was filed within two years of the incidents in question and is timely.

We reverse and remand for trial in accordance with the views herein expressed.

[Signature block omitted.]

Mr. Justice L. C. Gulbrandson dissenting.

I respectfully dissent.

The majority holds that the conduct complained of is not subject to NLRA proscription. In effect, an exception to the preemption requirement has been created by labeling the action as one in tort under state law. An opposite result was reached in Campbell v. McLean Trucking Company (E.D.N.Y., 1984), 592 F.Supp. 1560, 1564, where the court stated:

> A mere labeling of the conduct complained of, however, does not satisfy the requirements necessary to avoid preemption. The Supreme Court in Lockridge, 403 U.S. at 292, 91 S.Ct. at 1920, said that it is the conduct and not the legal description that is important. This substance-form problem was recognized, for example, in Breitegger v. C.B.S., 43 Cal.App.3d 283, 117 Cal.Rptr. 699, 706 (1974), where an unfair labor practice within the Board's jurisdiction was not cognizable in State court merely by labeling it an intentional tort.

Section 8 of the NLRA clearly prohibits employment discrimination, and

blacklisting is recognized as an unfair labor practice.

> Further, as indicated by Mount Desert Island Hospital and contrary to plaintiffs' State tort characterization, blacklisting has long been recognized as an unfair labor practice and, thus, prohibited by the Act. See NLRB v. Waumbec Mills, 114 F.2d 226, 232-33 (1st Cir.1940); Cone Bros. Contracting Co., 135 N.L.R.B. 108 (1962). In short, at the least, plaintiffs' claim one is "'arguably subject to . . . the Act' . . . [citation omitted] . . . and therefore come[s] within the primary jurisdiction of the . . . Board . . . ." Abrams v. Carrier Corp., 434 F.2d 1234, 1253 (2d Cir.1970), cert. denied, 401 U.S. 1009, 91 S.Ct. 1243, 28 L.Ed.2d 545 (1971). (Emphasis in original.)

Campbell, supra, 592 F.Supp. at 1563.

The majority opinion contains the following statement:

> No one in this litigation contends that plaintiffs were blacklisted for labor-related activities.

In fact, plaintiff's counsel, in his brief filed July 5, 1984, with the trial court, declared as follows:

> When this case was presented to the Board, plaintiffs had to raise and prove to the Board that defendants' maintenance, circulation and other use of the blacklist was for the purpose of discriminating against plaintiffs for activites [sic] relating to self-organization, collective bargaining, concerted actions or union affilitations [sic]. 29 USC §158(a)(1) and (3).

I also note that Local 768, International Brotherhood of Electrical Workers, is a party plaintiff in this action.

I agree with the trial court's determination that the first issue to be decided is whether blacklisting occurred, and if so, for what reasons. That issue is arguably within the jurisdiction of the NLRB and that Board should be allowed to exercise its remedial authority if blacklisting activity is found. The trial court, in dismissing the cause conditionally without prejudice, clearly would en-

tertain the plaintiff's action in tort if the NLRB found that blacklisting occurred.

I would affirm.

[Signature block omitted.]

I join in the foregoing dissent of Mr. Justice L. C. Gulbrandson.

[Signature block omitted.]

APPENDIX "C"

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA

Cause No. 55390	)
	)
DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
HOWARD P. FOLEY, a District of Columbia Corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,	)
	)
Defendants.	)

OPINION

Defendants City Electric and R.L. Payne Company, Inc., have moved this Court for summary judgment in their favor and against the plaintiffs in the above-entitled cause. The facts undisputed between the parties are these: The plaintiffs' union entered into a collective bargaining agreement

with the multi-employer unit of which the two defendants, City Electric and R.L. Payne Company, are members. Under the terms of the agreement, "the Union shall be the sole and exclusive source of referrals of applicants for Employment [and] the Employer shall have the right to reject any applicant for employment." (From Agreement between Kalispell Division, Montana Chapter N.E.C.A. and Local Union #768, I.B.E.W., March 1, 1980, Article VI, p.28). On or about August 26, 1980, the defendants sought qualified electricians for work on the Champion International expansion of their Frenchtown plant. All of the plaintiffs were referred by their union to defendant Howard P. Foley Company. Except for plaintiff Boharski, plaintiffs Malquist and Belt were referred to all the other named defendants.

The defendants rejected all of them for employment. Subsequently, the union filed a complaint with a grievance committee against the defendants for alleged practices of blacklisting which resulted in a deadlocked vote of the Labor-Management Committee. The union later dropped the complaint. The alleged blacklisting has not yet been submitted for consideration in proceedings before the National Labor Relations Board; instead, the plaintiffs filed this action with this Court claiming alleged blacklisting under Section 39-2-803, M.C.A.(1983), and damages for the intentional infliction of emotional distress caused by the alleged blacklisting practices of the defendants. For the reasons set out below, this Court finds that it lacks subject matter jurisdiction to adjudicate the plaintiffs' claims

at this time, the proper forum for this cause being the National Labor Relations Board.

In the absence of Congressional intent pertaining to the depth and breadth of the NLRA applicability, the U.S. Supreme Court case of San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1958), articulated two general guidelines for the scope of the state regulation that would be allowed in cases involving labor-management relations. The first rule pertained to clearly protected or prohibited conduct under federal statutes:

> "Where it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power

asserted by Congress and requirements imposed by state law."

The second rule is more sweeping:

> "Where are [sic] activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of the state interference with national policy is to be averted." Id., at 245.

Section 7 of the NLRA protects the rights of employees to organize and bargain collectively; Section 8 of the NLRA prohibits certain conduct considered unfair labor practices by the employer and by the labor organization. In subsequent decisions, however, the U.S. Supreme Court has refused a rigid and mechanical application of the Garmon guidelines that would preempt state courts from adjudicating causes of action involving "conduct traditionally subject to state jurisdiction without careful consideration

of the relative impact of such a jurisdictional bar on the various interest affected." Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 188 (1978). The cases indicate "...that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." Farmers v. Carpenters, 430 U.S. 290, 302 (1976).

In the case at bar, the plaintiffs have brought this action for alleged blacklisting and for the intentional infliction of emotional distress proximately caused by the alleged blacklisting of the defendants. (See Complaint, paragraph IX.) Section 39-2-803, M.C.A. (1983) pro-

hibits blacklisting and states impertinent [sic] part as follows:

> "If any company or corporation in this state authorizes or allows any of its agents to blacklist or any person does blacklist any discharged employee or attempts by word or writing or any other means whatever to prevent any discharged employee or any employee who may have voluntarily left the company's service from obtaining employment with another person..., such company or corporation or person is liable in punitive damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action..."

Since the plaintiffs allege the intentional infliction of emotional distress brought about by the alleged blacklisting practices of the defendants, the logical progression of events would require a finding of blacklisting first before this Court could determine whether or not the conduct complained of amounts to the intentional infliction of emotional distress in tort. It is the alleged

blacklisting then to which the arguably prohibited or arguably protected Garmon guidelines must be applied since the alleged conduct is not clearly protected or prohibited under the NLRA. If the alleged blacklisting is either arguably prohibited or arguably protected under the NLRA, then this Court must defer to the jurisdiction of the NLRB over this matter. However, if the alleged blacklisting is not either arguably prohibited or arguably protected by the NLRA, then this Court may assume subject matter jurisdiction over the alleged blacklisting and reach the merits of the plaintiffs' tortious claim against the defendants. As will be shown, this Court concludes that the alleged blacklisting by the defendants constitutes conduct arguably prohibited by the NLRA, thus raising the jurisdictional

bar pre-empting this Court from reaching and adjudicating the plaintiffs' tortious cause of action at this time.

The U.S. Supreme Court identified two factors relevant to the arguably prohibited branch of the Garmon doctrine in Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 196-197 (1978).

> "First, there [must exist] a significant state interest in protecting the citizen from the challenged conduct. Second,... the exercise of state jurisdiction over the tort claim [must entail] little risk of interference with the regulatory jurisdiction of the Labor Board... The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in Garner) or different from (as in Farmer) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the

Garmon doctrine was designed to avoid."

In short, the sweeping guidelines under the Garmon doctrine in the application of the NLRA do not result in a jurisdictional bar to state court actions for all tortious activity involving disputes between labor and management. But the exceptions are narrow and are subject to a rigorous test. The plaintiffs claim that the alleged blacklisting activity proximately cause [sic] the alleged intentional infliction of emotional distress. Under Montana law, this tort requires a showing that the defendant intentionally engaged in outrageous conduct causing the plaintiff to suffer severe emotional distress. Helton v. Reserve Life Insurance Co., 399 F.Supp. 1322 (1975). If the alleged blacklisting led in an unin-

terrupted chain of events to the suffering by the plaintiffs of lost wages, anguish, humiliation and mental suffering claimed in their Complaint (paragraph IX), then the alleged blacklisting would have to form the very heart of the tortiously outrageous conduct, the act element of the prima facie case for the intentional infliction of emotional distress. While it may be that the State of Montana has a legitimate interest in protecting citizens from the alleged blacklisting by enacting Section 39-2-803, M.C.A. (1983), the controversy presented to the NLRB would be the same as the one presented to this Court but without the part of the cause of action concerning the intentional infliction of emotional distress. If the charges in the plaintiffs' Complaint were filed before the Labor Board, the inquiry in

those proceedings would include whether the defendants actually engaged in blacklisting conduct against the plaintiffs and, if so, for what reasons. Whether the defendants' conduct caused the plaintiffs to suffer from the intentional infliction of emotional distress would play no part in the Labor Board's inquiry, and the Board would be in no position to award damages for pain, suffering, or medical expenses if, indeed, the blacklisting charges were proved. That would be for this Court to decide. But essential to the resolution of the tort claim before, this Court would first necessitate a finding of blacklisting. If the alleged blacklisting proximately caused the plaintiffs to suffer emotional distress, then this Court to [sic] would have to determine whether or not blacklisting occurred. The contro-

versy at bar and the one that would be presented before the NLRB do not merely overlap edges, they are one in the same except that this Court is additionally asked to entertain the claim of whether the plaintiffs suffered tortiously thereby. Therefore, this Court risks significant interference with the federal regulatory scheme intended by Congress to be presided over and centrally administered by the Labor Board by considering now the merits of the claim of intentional infliction of emotional distress where the alleged blacklisting is so inseparably a part of the tort complained of without deference first to the jurisdiction of the NLRB for its consideration of the alleged blacklisting and invocation of its federal remedial authority if any is so found. This Court is not willing to invade the

province of the Labor Board by staging an inquiry into blacklisting, this supposed list of electricians who were allegedly disapproved of and subsequently boycotted for, as yet, unknown reasons when they sought employment with the defendants.

Under facts upholding a claim in state court for the intentional infliction of emotional distress allegedly suffered in a union referral context similar to the case at bar, the U.S. Supreme Court held that "...it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abuse manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." Farmers v. Carpenters, 430 U.S. 290, 305 (1977). Employment

discrimination is clearly prohibited under Section 8 of the NLRA. It has already been shown why this Court concludes that blacklisting is arguably prohibited under the same section. The critical difference between Farmers and the case at bar is that in Farmers, the state tort was unrelated to the prohibited conduct and a function of the particularly abusive manner in which the discrimination was accomplished. The claim for the intentional infliction of emotional distress could be adjudicated without resolution of the merits of the underlying labor dispute. But here, not only is the state tort inseparably related to the arguably prohibited conduct of blacklisting, this alleged blacklisting has to be considered tortiously outrageous conduct, the very act act element of the prima

facie case for the intentional infliction of emotional distress and not just the proximate cause thereof. It is not the mere unavailability of work from which the plaintiffs have allegedly suffered in tort. The conduct complained of, the damages for which the plaintiffs are now seeking relief are a function of the alleged blacklisting itself, this supposed list of disapproved electricians who were allegedly boycotted by the defendants when seeking opportunities of employment therefrom, which in the opinion of this Court, may be nothing more than a veiled form of employment discrimination. But that conclusive determination is the province of the Labor Board and not for this Court which the arguably prohibited branch of the Garmon doctrine was designed to avoid.

In the event that the Labor Board finds that the defendants engaged in blacklisting practices against the plaintiffs, then claims pertaining to whether the plaintiffs suffered in tort thereby can be subsequently entertained in the forum of the District Court. This Court is of the opinion that Section 38-2-803, M.C.A. (1983), prohibiting blacklisting in Montana will not be abbrogated [sic] by jurisdictional deference to the NLRB at this time. As noted earlier, the Labor Board will not consider the tortious claims of the plaintiffs for the intentional infliction of emotional distress brought about by the alleged blacklisting. In the opinion of this Court, where the remedial authority of the NLRB ends, Section 39-2-803, M.C.A. (1983), begins and provides the injured plaintiff with a punitive mea-

sure to remedy more fully the wrongs from which he may have suffered.

Lack of subject matter jurisdiction prevents this Court from reaching the merits of the claim in tort for the purposes of determining whether summary judgment should be rendered. In passing, however, is should be noted that the plaintiffs strenuously argue that there yet exists a genuine issue of material fact as to whether or not blacklisting is arguably prohibited under the NLRA. Throughout their brief in opposition to summary judgment, the plaintiffs confuse the distinct difference between issues of fact and conclusions of law. Examples of factual issues would be whether or not the plaintiffs were ever employed by the defendants or differences as to what extent the plaintiffs suffered damage in tort at the hands of the

defendants which would first need to be resolved before a court could reach conclusions of law and render summary judgment. But whether blacklisting is arguably prohibited by the NLRA calls for a legal conclusion, a decision to be made by this Court and not a jury. Simply because the plaintiffs have reached a legal conclusion in interpretting [sic] the NLRA and the case law surrounding it contrary to a legal conclusion reached by the defendants and urged for adoption by this Court should not be confused with genuine factual issues that yet exist to be resolved at trial thus precluding this Court from rendering summary judgment.

In conclusion, this Court holds that blacklisting is arguably prohibited by the NLRA. Therfore [sic], this Court lacks subject matter jurisdiction to reach and adjudicate the

plaintiffs' tortious claim at this time. The defendant, City Electric, further notes the decision of Nunnally v. International Brotherhood of Electrical Workers, 41 St.Rptr. 1427 (1984) wherein the most analogous state statute of limitations applied to a claimed breach of a collective bargaining agreement and a claimed breach of duty of fair union representation under NLRA, which does not provide a statute of limitations, was held to be six months under Section 39-31-404, M.C.A. (1983) dealing with public collective bargaining. According to the record, the alleged acts complained of in this case took place on or about August 26, 1980, but, the action herein was filed on May 25, 1982, almost two years later. Preemption, as noted earlier, is a doctrine designed to prevent a number of

different tribunals including state and federal courts, with a variety of local procedures from adjudicating labor controversies likely to result in a multiplicity of conflicting decisions. The rational [sic] behind pre-emption of state courts, is the same which prohibits federal courts from intervening in such cases except by way of review or on application of the Labor Board. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). It is unclear from the Nunnally opinion how the labor controversy got there enabling the federal court to reach a decision on the applicable statute of limitations to the claims before it. Assuming that the cause of action arrived by way of review or on application of the Labor Board, this Court distinguishes Nunnally from the case at bar. As noted earlier,

Nunnally involved a claimed breach of a collective bargaining agreement and a claimed breach of duty of fair union representation, activities not arguably protected or arguably prohibited under the Garmon doctrine, but clearly protected by Section 7 and clearly prohibited by Section 8 respectively under the NLRA. The case at bar involves both a cause of action in alleged blacklisting, arguably prohibited conduct under the NLRA, with a punitive measure under Section 39-2-803, M.C.A. (1983) and a cause of action in tort, the intentional infliction of emotional distress as a function thereof. Since the alleged blacklisting under Section 39-2-803, MC.A. [sic] (1983), is arguably subject to the NLRA, this Court is of the opinion that the six-month limitation under the Nunnally rationale would apply

only to the punitive remedial measure under the said statute. The intentional infliction of emotional distress is a tort, albeit a function of the alleged blacklisting, and subject to a tort statute of limitations. For the intentional infliction of emotional distress in Montana, that would be three years under Section 27-2-204(1), M.C.A. (1983).

Therefore, this Court is of the opinion that a punitive measure for blacklisting under Section 39-2-803, M.C.A. (1983) would be barred by the running of the six-month period of limitations, however, the tort of intentional infliction of emotional distress would still be alive and viable as a cause of action.

In light of the foregoing reasons, this cause should be dismissed as to all defendants, but done so

without prejudice conditionally, until such time as the Labor Board rules accordingly on the plaintiffs' blacklisting charges. In the event that the NLRB finds that no blacklisting occurred, or be prevented from making an inquiry on account of the running of the applicable statute of limitations, or decline from rendering a decision for any other reasons, then this cause will be dismissed with prejudice. Only if the Labor Board finds that blacklisting occurred will this Court then entertain further the plaintiffs' cause of action in tort but not the proven blacklisting claim

and punitive measures available under Section 39-2-803, M.C.A. (1983).

ORDER

It is so ordered.

DATED this 12th day of September, 1984.

s/
JOHN S. HENSON
District Judge

cc: Terry Wallace
Ron Bender
Lawrence Daly
Karl Boehm
Greg C. Black-Butte

APPENDIX "D"

IN THE DISTRICT COURT OF THE

FOURTH JUDICIAL DISTRICT OF THE

STATE OF MONTANA, IN AND FOR

THE COUNTY OF MISSOULA

Cause No. 55390

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,

Plaintiffs,

-vs-

HOWARD P. FOLEY COMPANY, a District of Columbia corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,

Defendants.

MOTION FOR SUMMARY JUDGMENT

COMES NOW, Defendant R. L. Payne Company, Inc. and pursuant to Rule 56 of the Montana Rules of Civil Procedure, hereby moves this Court for summary judgment in its favor, that there is no genuine issue as to any material

fact, and that this Defendant is entitled to summary judgment in its favor as a matter of law as more fully appears in the brief and affidavit filed in support hereof.

DATED this 19 day of March, 1984.

WORDEN, THANE & HAINES, P.C.

By: s/
Ronald A. Bender
P. O. Box 4747
Missoula, Montana 59806
Attorneys for Defendant
R. L. Payne Company, Inc.

CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion for Summary Judgment was duly served by prepaid mail upon the following counsel of record this 19 day of March, 1984:

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s/ Linda J. Mamber

IN THE DISTRICT COURT OF THE

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STATE OF MONTANA, IN AND FOR

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Cause No. 55390

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,

Plaintiffs,

-vs-

HOWARD P. FOLEY COMPANY, a District of Columbia corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,

Defendants.

DEFENDANT R. L. PAYNE COMPANY, INC. BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

FACTS

Sometime during the latter part of 1980, Champion International Corporation at Bonner, Montana, undertook to hire M M & R, an electrical contractor, to do electrical work at the Frenchtown packaging plant. Due to

production delays, M M & R's contract with the Champion Project was terminated during the latter part of 1980. The Howard P. Foley Company was hired to take their place. R. L. Payne Company, Inc. was a subcontractor of H. P. Foley Company. The contract between Foley and Payne called for R. L. Payne Company, Inc. to furnish Howard P. Foley Company with electricians. (See attached Exhibit "A" - affidavit of Robert L. Payne.) All of the electricians who wished to be hired by R. L. Payne Company, Inc. were referred by the local electrical workers union, Local 768, International Brotherhood of Electrical Workers (hereinafter IBEW).

The IBEW Local Union 768 had a labor agreement with the Kalispell Division of the National Electrical Contractors Association (hereinafter

NECA), which division included the Missoula area. (See attached Exhibit "A".) Under this agreement, R. L. Payne Company could choose to hire or not to hire without providing the employee with a reason. (See attached Exhibit "B" - Article VI, page 28.) On or about August 26, 1980, Plaintiffs Malquist and Belt were referred by the union to R. L. Payne Company, Inc. Their employment was rejected and no reason was given. (See attached Exhibit "A".) Neither Malquist nor Belt had ever previously worked for R. L. Payne Company, Inc. (See attached Exhibits "A", "C", and "D".)

Plaintiff Boharski did not report to R. L. Payne Company, Inc. as a prospective electrician. (See attached Exhibits "A" and "C".) For this reason, he was not considered for employ-

ment on the Champion Project by R. L. Payne Company, Inc.

Plaintiffs brought suit against Defendants Howard P. Foley Company, City Electric, and R. L. Payne Company, Inc. alleging Defendants blacklisted Plaintiffs by communicating false and misleading information by telephone and written message to potential employers to prevent them from being hired. Defendant R. L. Payne Company, Inc. now moves this Court for summary judgment in its favor.

DISCUSSION

I.

Summary Judgment is to be Granted Where the Moving Party Has Shown that There is no Genuine Issue as to Any Material Fact and the Moving Party is Entitled to a Judgment as a Matter of Law.

Rule 56 of the Montana Rules of Civil Procedure provides for summary judgment proceedings. Section (c)

declares that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Cereck v. Albertson's Inc., ___ Mont. ___, 637, P.2d 510 (1981); Reaves v. Reinbold, ___ Mont. ___, 615 P.2d 896 (1980); Dunjo Land Co. v. Hested Stores Co., 163 Mont. 87, 515 P.2d 961 (1973); D. Pack River Co. v. Young, 162 Mont. 271, 511 P.2d 12 (1973); Mustang Beverage Co. v. Jos Schlitz Brewing Co., 162 Mont. 243, 511 P.2d 1 (1973); Silloway v. Jorgenson, 146 Mont. 307, P.2d 167 (1965). Where the record discloses no genuine issue as to any material fact, the burden is upon the party in oppos-

ing the motion to present evidence of a material and substantial nature raising the genuine issue of fact. Dewinter v. Capp Homes, Inc., 162 Mont. 19, 507 P.2d 1061 (1973); Roop v. Anaconda Co., 159 Mont. 28, 494 P.2d 922 (1972). There is no genuine issue of fact that Plaintiffs were not employees of Defendant R. L. Payne Company, Inc., or that Defendant R. L. Payne Company, Inc. did not communicate to any potential employer that the Plaintiffs were not to be hired.

Defendant R. L. Payne Company, Inc. served the Plaintiffs on October 26, 1983 with requests for admissions and interrogatories. By stipulation dated December 12, 1983, Plaintiffs were given an additional thirty (30) days to respond to the requests for admissions. On March 12, 1984, this Defendant received Plain-

tiffs' responses to the requests for admissions and interrogatories dated January 12, 1984. The following facts are conclusively admitted:

1. Dale Malquist is not now nor has he ever been an employee of R. L. Payne Company, Inc.

2. George Belt is not now nor has he ever been an employee of R. L. Payne Company, Inc.

3. George Boharski was not employed by R. L. Payne Company, Inc. during the late summer and early fall of 1980, nor anytime subsequent to that on a project at the Champion International Plant at Frenchtown, Montana, also referred to as the "Champion Project".

Plaintiffs have allegd [sic] in Paragraphs VI and VIII of their complaint that Defendant R. L. Payne Company, Inc. blacklisted Plaintiffs.

M.C.A. sections 39-2-801 et. seq. are the pertinent Montana statutes on blacklisting. Pertinent sections of those statutes read as follows:

> 39-2-801 Employee to be furnished upon demand with reason for discharge. It is the duty of any person after having discharged any employee from his service, upon demand by such discharged employee, to furnish him in writing a full, succinct and complete statement of the reason of his discharge and if such person refuses so to do within a reasonable time after such demand, it is unlawful thereafter for such person to furnish any statement of the reason of such discharge to any person or in any way to blacklist or to prevent such discharged person from procuring employment elsewhere subject to the penalties and damages prescribed in this part.
>
> 39-2-802 Protection of discharged employees. If any person after having discharged an employee from service prevents or attempts to prevent by word or writing of any kind such discharged employee from obtaining employment with any other person such person is punishable as provided in 39-2-804 and is liable in punitive damages to such discharged person, to be recovered by civil action. No person is prohibited from inform-

> ing by word or writing any person to whom such discharged person or employee has applied for employment a truthful statement of the reason for discharge.
>
> 39-2-803 Blacklisting prohibited. If any company or corporation in this state authorizes or allows any of its agents to blacklist or any person does blacklist any discharged employee or attempts by word or writing of [sic] any other means ever to prevent any discharged employee or any employee who may have voluntarily left the company's service from obtaining employment with another person, except as provided for in 39-2-802, such company or corporation or person is liable in punitive damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action, and is also punishable as provided in 39-2-804. (Emphasis added.)

Each one of these statutes cross-reference "employment" as pertinent to its interpretation. The term "employment" is defined as follows:

> 39-2-101 Employment defined. The contract of employment of a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person.

There are no Montana cases reported interpreting or construing M.C.A. section 39-2-801 through -804 nor 39-2-101. However, the Oklahoma Criminal Court of Appeals construed a similar statute in State v. Dabney, 141 P.2d 303 (1943). Their statute read:

> No firm, corporation or individual shall blacklist or require a letter of relinquishment, or publish, or cause to be published, or blacklisted, any employee, mechanic or laborer, discharged from or voluntarily leaving the services of such company, corporation, or individual, with the intent and for the purpose of preventing such employee, mechanic or laborer, from engaging in or securing similar or other employment from any other corporation, company or individual. (Emphasis added.)

The Court held:

> An intent to injure by preventing future employment is the essence of the offense of blacklisting . . . all that is required under the statute here under consideration is that the former employer blacklist a former employee with the intent and for the purpose

> of preventing such former employee from thereafter obtaining work. Id. at 308-309. (Emphasis added.)

The district court of the Western District of Arkansas in Choltes v. Signal Delivery Service, Inc., 548 F.Supp. 487 (1982), recently held: "Although an employer may maliciously terminate an 'at will' employee, the employer may not maliciously induce others not to employ the employee". For these cases and the statutes to apply, there must be or have been an employer-employee relationship. The Fifth Circuit Court of Appeals upheld an order of the National Labor Relations Board directing an employer to cease and desist from unfair labor practices and to reinstate a demoted employee with back pay in National Labor Relations Board v. Varo, Inc., 525 F.2d 293 (5th Cir. 1970). The court held that there

was substantial evidence supporting the board's findings that the employer had made threats that replaced strikers would not find work elsewhere. Just the year before, the Fifth Circuit had enforced an order of the National Labor Relations Board in NLRB v. Buddy Schoellkopf Products, Inc., 410 F.2d 82 (5th Cir. 1969), holding that evidence supported the conclusion of the Board that the employer had threatened their employees that if they joined the union the company would see to it that they would not secure employment elsewhere in the future. In both of these Fifth Circuit cases in which evidence of blacklisting was found an employer-employee relationship existed. The Ninth Circuit Court of Appeals in Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974), held that a speech given

by the management of an architectural firm prior to a decertification election was in effect a threat to blacklist any employee who voted with the union. In this case, as in all the previous cases cited, an employee-employer relationship was fundamental to a blacklisting violation. In the present case, Plaintiffs have admitted that such a relationship did not exist; and Robert L. Payne, President and owner of R. L. Payne Company, Inc., has sworn in his affidavit that such a relationship did not exist; therefore, no blacklisting claim is possible against Defendant R. L. Payne Company, Inc. The very foundation of their claim is without merit.

Plaintiffs' complaint against this Defendant alleges that it blacklisted Plaintiffs by communicating false and misleading information

by telephone and written message to potential employers to prevent Plaintiffs from being hired. However, Plaintiffs' responses to this Defendant's interrogatories indicate that Plaintiffs do not know whether there were any "blacklisting" communications made by phone by this Defendant. It appears that only the Plaintiff [sic] can testify as to the blacklisting conduct of this Defendant and yet they are unaware of not only the telephone communications, but the existence of any written message; the dates the message, if any, was circulated; who received the message, if anyone; and the whereabouts of the written message, if it in fact exists. (See attached Exhibit "D").

II.

Plaintiffs Have Waived any Claim Against this Defendant as They Have not Followed Procedures Outlined in Their Labor Agreement.

Plaintiffs are barred from bringing this action because they have failed to exhaust the remedies provided for in the agreement between IBEW Local Union 768 and the Kalispell Division of NECA. The agreement specifically provides a grievance and arbitration procedure for any alleged labor violatio (see, the labor agreement attached as Exhibit "B", Article 1, Section 6, Page 3). Plaintiffs' [sic] admit that:

1. Dale Malquist has not now nor has he ever filed a labor grievance against R. L. Payne Company, Inc. under the labor agreement with Local 768 IBEW;

2. George Belt has not now nor has he ever filed a labor grievance against R. L. Payne Company, Inc. under the labor agreement with Local 768 IBEW;

3. George Boharski has not now nor has he ever filed a labor grievance against R. L. Payne Company, Inc. under the labor agreement with Local 768 IBEW;

4. Dale Malquist, George Belt, and George Boharski were, and are, members in good standing of Local 768 IBEW. (See, attached Exhibits "C" and "D".) These admissions clearly demonstrate that there is no genuine issue as to these material facts.

Plaintiffs failed to file any grievances against R. L. Payne Company, Inc. for these alleged violations and therefore have waived any right to bring this cause of action in state

court. They have not pursued the remedies, including arbitration, provided to them in the labor agreement and are therefore barred from bringing this claim in state court.

Plaintiffs have brought this cause of action based on an alleged violation of state blacklisting law. It is well established in this circuit that artful pleading by the plaintiff will not be allowed to conceal the true nature of the complaint. Schroeder v. Trans World Airline, Inc., 702 F.2d 189, 191 (9th Cir. 1983); Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir.), cert. denied, 439 U.S. 930 (1978); Johnson v. England, 356 F.2d 44 (9th Cir.) cert. denied, 384 U.S. 961 (1966). Though not plead, Plaintiffs' complaint involves principles of federal labor law, specifically 29 U.S.C.

section 158. Therefore, federal law applies superseding state contract law or other state law theories. Republic Steel Corp. v. Maddox, 379 U.S. 650, 657 (1965); Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flower Company, 369 U.S. 95, 102-103 (1965); Beers Southern Pacific Transportation Company, 703 F.2d 425, 427 (9th Cir. 1983); Fristo v. Reynolds Metal Company, 615 F.2d 1209, 1212 (9th Cir. 1980); Johnson v. England, 356 F.2d 44, 48 (9th Cir.), cert. denied, 384 U.S. 961 (1966); accord. Sheeran v. General Electric Company, 593 F.2d 93, 96-97 (9th Cir. 1979).

Federal case law has long held that where arbitration clauses are involved they "are to be liberally construed and any doubts about the scope of an arbitration clause are to

be resolved in favor of arbitration. [sic] United Steel Workers of America v. Warrior & Gold Navigation Company, 363 U.S. 574, 582-83 (1960). ATSA of California, Inc. v. Continental Insurance Company, 702 F.2d 172, 175 (9th Cir. 1983).

It has long been the rule in many circuit courts that "arbitration deprives the judiciary of jurisdiction over the particular controversy and the courts have long ruled that there must be strict adherence to the essential terms of the agreement to arbitrate." Huntington Alloys v. United Steel Workers of America, 623 F.2d 335, 338 (4th Cir. 1980); see also, Brotherhood of Railway and Steamship Clerks v. Norfolk Southern Railway Company, 143 F.2d 1015, 1017 (4th Cir. 1944); Parsons and Whittemore Overseas Company, Inc. v. Societe Generale

de L'Industrie du Papier (RAKTAN), 508 F.2d 969 (2nd Cir. 1974).

The general rule requiring exhaustion of administrative remedies is applicable to labor-managment disputes where the issue is subject to a contractual grievance and arbitration procedure. Republic Steel v. Maddox, 379 U.S. 650 (1965); National Treasury Employee Union v. Kurtz, 636 F.2d 411, 413 (D.C. Cir. 1980).

Plaintiffs fail to properly follow the grievance and arbitration procedures provided for in their labor-management contract. Their complaint alleges facts which would bring their cause of action under federal labor law. For this reason, federal law supersedes state law and federal case law clearly bars this cause of action from being brought in state district court.

III.

Under the Terms of the Labor Agreement, Defendant R. L. Payne Company, Inc. Had the Right to Reflect any Electricians Referred from the Union Hiring Hall, Which Right this Defendant Exercised.

The labor agreement between the Kalispell Division, Montana Chapter NECA and Local Union 768, IBEW, (attached as Exhibit "B") in Article VI, page 28 provides: "The employer shall have the right to reject any applicant for employment."

Plaintiffs Malquist and Belt reported to R. L. Payne Company, Inc. as prospective employees. Both were rejected in accordance with the provision just quoted from the labor agreement. George Boharski did not report to R. L. Payne Company, Inc. for work and therefore was never considered for the position, as was ad-

mitted in the following request for admission of fact:

> George Boharski did not report to R. L. Payne Company, Inc. on or about August 26, 1980 for work as an electrician on the "Champion Project".

Simply because Defendant R. L. Payne Company, Inc. chose to exercise its right of refusal with respect to Plaintiffs Malquist and Belt does not raise a claim of blacklisting against this Defendant. A cause of action for blacklisting requires (1) the employee be discharged; and (2) the former employee be prevented from procuring employment elsewhere. In the present case, the Plaintiffs were not "discharged". They were never hired. The fundamental requirement that an employee-employer relationship exists was never satisfied. Further, Plaintiffs' responses to this Defendant's interrogatories demonstrate there is

no evidence supporting their claim that this Defendant prevented them from obtaining employment elsewhere.

IV.

This Court Lacks Subject Matter Jurisdiction to Hear this Cause of Action.

Owing to the fact that this case involves labor relations, the Plaintiff members of IBEW Local Union 768 are covered by the National Labor Relations Act (NLRA), 29 U.S.C. section 152(5):

> Exclusive jurisdiction of representation disputes is vested in the National Labor Relations Board (NLRB). See, International Brotherhood of Boilmakers v. Hardeman, 401 U.S. 233 (1971); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

(See, Senior United States District Judge Russell E. Smith's order in Nurses Committee to Save St. Joseph's v. Gillespie, attached to this brief

as Exhibit "E".) This order may be judicially noted by this Court. Rule 202(b)(6), Montana Rules of Evidence. Judge Russell SMith [sic] held there was no subject matter jurisdiction. In so ruling, Judge Russell Smith relied on San Diego Building Trades Council v. Garmon, supra, where the court started,

> It is essential to the administration of the Act that these determinations (whether activity regulated by the State was governed by Section 7 and Section 8 of the National Labor Relations Act or outside both these sections). But Courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board (NLRB). What is outside the scope of this Court's authority cannot remain within a State's power and State jurisdiction too must yield to the exclusive primary confidence of the Board. Garmon at 244-45.

V.

Plaintiff Cannot Maintain a Cause of Action for Damages for Intentional Infliction of Mental and Emotional Distress.

Plaintiffs also make claims that Defendants' acts have been willful and malicious and have put the Plaintiffs under extreme mental and emotional distress. Plaintiffs also allege the Defendants' act have caused them injury in their careers and impairment of their reputations. See Paragraph X of Plaintiffs' complaint. Defendant R. L. Payne Company, Inc. infers that Plaintiffs are attempting to state a cause of action for an intentional infliction of mental and emotional distress, an independent cause of action that has never been recognized in Montana.

Senior United States District Judge, Russell E. Smith, considered an

independent claim for intentional infliction of emotional distress in Helton v. Reserve Life Insurance Co., 399 F.Supp. 1322 (D. Mont. 1975). Plaintiff Helton charged that the defendant insurance company had refused to pay benefits due under a disability policy and inter alia sought damages for emotional distress caused by defendant's conduct. Judge Smith observed that if the claim were true, "Defendant's conduct was bad, but even so, it amounts to no more than a deliberate stalling and an ultimate failure to pay." Id. at 1323. He granted the defendant's motion to dismiss on the ground that the plaintiff could not recover under Montana law under the facts presented. Id.

In reaching his decision, Judge Smith noted that the Montana Supreme Court had not considered "liability

for emotional distress caused by non-violent conduct and unaccompanied by any fear for personal safety." Despite the absence of Montana precedent, he concluded that no current authority would support recovery. According to Judge Smith, although the Restatement (2nd) of Torts (1965) recognizes liability for intentional and unreasonable infliction of emotional distress, it does not give protection to mental and emotional tranquility. He quoted from Prosser concerning the extreme factual circumstances in which liability may arise:

> So far as it is possible to generalize from the cases, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. Such extreme outrage has been found, as in the leading . . . case, in decoying a woman suspected of insanity to a

> hospital by a concocted tale of an injured husband and child; in spreading a false rumor that the Plaintiff's son had hanged himself; in bringing a mob to the Plaintiff's door at night with the threat to lynch him unless he left town; and in wrapping up a very gory, dead rat instead of a loaf of bread, for a sensitive soul to open. (Footnotes omitted.)

Id at 1323-24, quoting from W. P. Prosser, Law of Torts, section 11 (3rd Ed. 1964).

WHEREFORE, this Defendant respectfully submits that there are no genuine issues as to any material fact and that this Defendant is entitled to judgment as a matter of law.

DATED this 19 day of March, 1984.

WORDEN, THANE & HAINES, P.C.

By: s/_____
Ronald A. Bender
P.O. Box 4747
Missoula, Montana 59806
Attorneys for Defendant

CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion for Summary Judgment was duly served by prepaid mail upon the following counsel of record this 19 day of March, 1984:

Terry A. Wallace, Esq.
Attorney at Law
119 Mount Avenue
Missoula, Montana 59801
Attorney for the Plaintiffs

Gregory C. Black, Esq.
Corette, Smith, Pohlman & Allen
Attorneys at Law
P.O. Box 509
Butte, Montana 59703
Attorneys for Defendant City Electric

Lawrence F. Daly, Esq.
Garlington, Lohn & Robinson
Attorneys at Law
P.O. Box 7909
Missoula, Montana 59801
Attorneys for Defendant Howard P. Foley Company

s/ Linda J. Mamber

IN THE DISTRICT COURT OF THE

FOURTH JUDICIAL DISTRICT OF THE

STATE OF MONTANA, IN AND FOR

THE COUNTY OF MISSOULA

Cause No. 55390

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,

Plaintiffs,

-vs-

HOWARD P. FOLEY COMPANY, a District of Columbia corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,

Defendants.

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Missoula)

ROBERT L. PAYNE, being first duly sworn, says:

1. That he is the owner, sole stockholder and President of the Montana corporation known as R. L. Payne Company, Inc.

2. That as the owner of R. L. Payne Company, Inc., he entered into a contract with Howard P. Foley Company on August 27, 1980, for work to be performed at the Champion packaging plant located south of Frenchtown, Montana.

3. That said contract with the Howard P. Foley Company required him to provide electricians for the work to be performed at the Champion project.

4. That his company was a member of the Kalispell Division, Montana Chapter of the NECA and therefore was bound by the agreement between said NECA Chapter and Local Union 768, IBEW.

5. That all potential electricians were to be referred by the Local Union 768, IBEW.

6. That Dale Malquist and George Belt are not now, nor have they ever been employees of R. L. Payne Company, Inc.

7. That George Boharski worked for him many years prior to 1980, but was not an employee of R. L. Payne Company, Inc. on or shortly before August 26, 1980.

8. That only Dale Malquist and George Belt reported to R. L. Payne Company, Inc. as prospective electricians.

9. That neither Malquist nor Belt were accepted for employment.

10. That neither Malquist nor Belt were given reasons for not being hired.

11. That by rejecting Malquist and Belt for employment and not providing them with a reason, he exer-

cised the employer's privilege provided for in the union agreement.

12. That he has never communicated by telephone to another company that Malquist, Belt or Boharski were not to be hired.

13. That he has never communicated by written message to another company that Malquist, Belt or Boharski were not to be employed.

14. That he has never communicated by any means that Malquist, Belt or Boharski were not to be employed.

15. That he has never transmitted any false or misleading information to other electrical contractors as to the reasons Malquist, Belt or Boharski were not to be retained for employment.

16. Further affiant sayeth not.

s/
Robert L. Payne

SUBSCRIBED AND SWORN TO before me this 16th day of March, 1984.

s/Stacey Weldele-Wade
Notary Public for the State of Montana
Residing at Missoula, Montana
(SEAL) My commission expires: _____

EXHIBIT "B"

ARTICLE VI

REFERRAL PROCEDURE

In the interest of maintaining an efficient system of production in the Industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interest of the Employees in their employment status within the area, and of eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for Employment:

1. The Union shall be the sole and exclusive source of referrals of applicants for Employment.

2. The Employer shall have the right to reject any applicant for employment.

3. The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be effected in any way by rules, regulations, by-laws, constitutional provisions, or any other aspect or obligation of Union membership policies or requirements. All such selection and referral shall be in accordance with the following procedure.

4. The Union shall maintain a register of applicants for Employment established on the basis of the Groups

listed below. Each applicant for employment shall be registered in the highest priority Group for which he qualifies.

EXHIBIT "C"

IN THE DISTRICT COURT OF THE

FOURTH JUDICIAL DISTRICT OF THE

STATE OF MONTANA, IN AND FOR

THE COUNTY OF MISSOULA

Cause No. 55390

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,

Plaintiffs,

-vs-

HOWARD P. FOLEY COMPANY, a District of Columbia corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,

Defendants.

REQUEST FOR ADMISSIONS OF FACT

Defendant R. L. Payne Company, Inc. requests Plaintiffs Dale Malquist, George Boharski and George Belt, within thirty (30) days after service of this request, to make the

following admissions for the purpose of this action only:

REQUEST NO. 1: That each of the following statements is true:

(a) Dale Malquist is not now, nor has he ever been, an employee of R. L. Payne Company, Inc.

(b) George Belt is not now, nor has he ever been, an employee of R. L. Payne Company, Inc.

(c) George Boharski was not employed by R. L. Payne Company, Inc. during the late summer and early fall of 1980, nor any time subsequent to that, on a project at the Champion International plant at Frenchtown, Montana, also referred to as the "Champion Project".

(d) George Boharski did not report to R. L. Payne Company, Inc. on or about August 26, 1980, for work as

an electrician on the "Champion Project".

(e) Dale Malquist has not now, nor has he ever, filed a labor grievance against R. L. Payne Company, Inc. under the labor agreement with Local 768 IBEW.

(f) George Belt has not now, nor has he ever, filed a labor grievance against R. L. Payne Company, Inc. under the labor agreement with Local 768 IBEW.

(g) George Boharski has not now, nor has he ever, filed a labor grievance against R. L. Payne Company, Inc. under the labor agreement with Local 768 IBEW.

(h) Dale Malquist, George Belt and George Boharski were and are members in good standing of Local 768, IBEW.

RESPONSE:

a. Admitted.

b. Admitted.

c. Admitted.

d. Admitted.

e. Admitted.

f. Admitted.

g. Admitted.

h. Admitted.

Dated January 12, 1984

s/
Dale Malquist

s/
George Belt

s/
George Boharski

SUBSCRIBED AND SWORN TO BEFORE ME
This 10 day of February, 1984

s/ Terry A. Wallace
Notary Public for the State of Montana
Residing at Missoula, Montana
My commission expires: _____

(NOTARY SEAL)

EXHIBIT "D"

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR
THE COUNTY OF MISSOULA

Cause No. 55390

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,

Plaintiffs,

-vs-

HOWARD P. FOLEY COMPANY, a District of Columbia corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,

Defendants.

INTERROGATORIES

TO: Dale Malquist, George Boharski, George Belt, and their attorney of record, Terra A. Wallace:

Defendant R. L. Payne Company, Inc., pursuant to Rule 33 of the Montana Rules of Civil Procedure, requests the Plaintiffs named above to answer the following interrogatories in writing and under oath within thirty (30) days after receipt hereof.

Amended or supplemental answers to these interrogatories, as required by Rule 26(e) of the Montana Rules of Civil Procedure, are also requested and should be served and filed at any later date.

INTERROGATORY NO. 1: Has Dale Malquist ever been employed by R. L. Payne Company, Inc.?

ANSWER: No.

INTERROGATORY NO. 2: If the preceding answer is "yes," for each employment, please state:

(a) Where such employment occurred.

(b) When such employment occurred.

(c) How long such such employment continued.

ANSWER: See #1 above

(a)

(b)

(c)

INTERROGATORY NO. 3: Has George Belt ever been employed by R. L. Payne Company, Inc.?

ANSWER: No.

INTERROGATORY NO. 4: If the preceding answer is "yes," for each employment, please state:

(a) Where such employment occurred.

(b) When such employment occurred.

(c) How long such such employment continued.

ANSWER: See #3, above

(a)

(b)

(c)

INTERROGATORY NO. 5: Has George Boharski ever been employed by R. L. Payne Company, Inc.?

ANSWER: Yes.

INTERROGATORY NO. 6: If the preceding answer is "yes," for each employment, please state:

(a) Where such employment occurred.

(b) When such employment occurred.

(c) How long such such employment continued.

ANSWER: See #5, above

(a) Local Union #768. Missoula and Kalispell.

(b) From April 1972 through July 1974.

(c) 27 Months.

INTERROGATORY NO. 7: Has Dale Malquist ever filed a charge with the National Labor Relations Board [hereinafter referred to as NLRB] or a grievance under the labor agreement

with Local 768 IBEW against R. L. Payne Company, Inc.?

ANSWER: No.

INTERROGATORY NO. 8: If the preceding answer is "yes," for each grievance or charge filed, please state:

(a) When the grievance or charge was filed.

(b) The alleged grievance or charge.

(c) The final determination.

ANSWER: See #7, above

(a)

(b)

(c)

INTERROGATORY NO. 9: Has George Belt ever filed a charge with the NLRB or a grievance under the labor agreement with Local 768 IBEW against R. L. Payne Company, Inc.?

ANSWER: No.

INTERROGATORY NO. 10: If the preceding answer is "yes," for each grievance or charge filed, please state:

(a) When the grievance or charge was filed.

(b) The alleged grievance or charge.

(c) The final determination.

ANSWER: See #9, above

INTERROGATORY NO. 11: Has George Boharski ever filed a charge with the NLRB or a grievance under the labor agreement with Local 768 IBEW against R. L. Payne Company, Inc.?

ANSWER: No.

INTERROGATORY NO. 12: If the preceding answer is "yes," for each grievance or charge filed, please state:

(a) When the grievance or charge was filed.

(b) The alleged grievance or charge.

(c) The final determination.

ANSWER: See #11, above

(a)

(b)

(c)

INTERROGATORY NO. 13: Please state the dates upon which Defendant R. L. Payne Company, Inc. allegedly telephoned other electricians for the purpose of insuring that the Plaintiffs would not be employed as electricians in this area. Please list the names and current addresses of all witnesses who can testify as to these alleged telephone calls.

ANSWER: We do not know the exact dates, or that the conduct of blacklisting was accomplished by telephone.

The witnesses who will testify about the conduct are the plaintiffs:

Dale Malquist
P. O. Box 337
Lincoln, Montana 59639

George Belt
Route 1, P.O. Box 1478
Whitehall, Montana 59759

George Boharski
280 Highland Drive
Kalispell, Montana 59901

INTERROGATORY NO. 14. Please state the dates upon which the Defendant R. L. Payne Company, Inc., allegedly circulated a written list containing the names of the plaintiffs herein to other electricians for the purpose of insuring that the plaintiffs would not be employed as electricians.

a. Please list the names and current addresses of all witnesses who can testify as to the circulation of the alleged written list;

b. Pursuant to Rule 34, M.R. Civ.P., please produce a copy of said written list.

ANSWER: The exact dates of the circulation of such list is not known to plaintiffs, who are the witnesses who will testify, and whose current addresses are found in the response to #13, above. No such list is in plaintiffs' possession at this time.

Dated January 12, 1984.

s/
Dale Malquist

s/
George Belt

s/
George Boharski

SUBSCRIBED AND SWORN TO BEFORE ME
This 10 day of February, 1984

s/ Terry A. Wallace
Notary Public for the State of Montana
Residing at Missoula, Montana
My commission expires: _____

(NOTARY SEAL)

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR
THE COUNTY OF MISSOULA

No. 55390

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,

Plaintiffs,

-vs-

HOWARD P. FOLEY COMPANY, a District of Columbia corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,

Defendants.

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, CITY ELECTRIC, pursuant to Rule 56 of the Montana Rules of Civil Procedure, and moves this Court for a summary judgment in its favor. This motion is made upon the grounds and for the reasons that there are no genuine issues as to any material fact and that this Defendant is entitled to entry of

judgment in its favor as a matter of law. This motion is based upon the pleadings, answers to interrogatories, affidavits and briefs on file before this Court.

DATED this 17th day of April, 1984.

CORETTE SMITH POHLMAN & ALLEN

By GREGORY C. BLACK
Attorneys for City Electric
P. O. Box 509
Butte, Montana 59703

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR
THE COUNTY OF MISSOULA

No. 55390

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,

Plaintiffs,

-vs-

HOWARD P. FOLEY COMPANY, a District of Columbia corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,

Defendants.

BRIEF IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT
BY CITY ELECTRIC

COMES NOW the Defendant, CITY ELECTRIC, and submits the following Brief in support of its Motion for Summary Judgment.

I. FACTS

During 1980, Champion International, of Bonner, Montana, hired an electrical contractor, M M & R, to

perform electrical work at its Frenchtown packaging plant at Frenchtown, Montana. M M & R was subsequently terminated, and Champion hired Howard P. Foley Company (hereinafter "Foley") to replace M M & R. Following this change, Champion also contracted with City Electric to perform certain electrical work at the Frenchtown plant. Because of this direct contract with Champion, City Electric found it necessary to hire additional electricians (see Affidavit of Jerry Jacobson, attached hereto as Exhibit "A" and hereby incorporated by reference).

City Electric was and is a member of the Kalispell Division, Montana Chapter of the National Electrical Contractors' Association. During 1980, City Electric was a signatory to a collective bargaining agreement

between said NECA chapter and Local 768, IBEW. A copy of this collective bargaining agreement is before this Court as Exhibit "A" to R. L. Payne Company's (hereinafter Payne) Brief in Support of Motion for Summary Judgment. This labor agreement covered the Missoula area and was the labor agreement in effect at all times material to the present litigation.

The labor agreement set forth certain hiring procedures through the union and provided inter alia that an employer had the right to reject any applicant for employment (Art. VI, p. 28). On or about September 4, 1980, Plaintiffs Malquist and Belt were rejected for employment by City Electric. Neither of these individuals had ever been employed previously by City Electric (see Exhibit "A"). Plaintiff Boharski did not ever seek

employment with City Electric in connection with Champion's Frenchtown project, and thus was never accepted or rejected for employment by City Electric, although Boharski had worked for City Electric sometime prior to the Frenchtown project (see Exhibit "A").

II. PLEADINGS

Plaintiffs sued Foley, Payne and City Electric, alleging that Foley blacklisted them with Payne and City Electric after refusing to continue employing them (Paragraph VI.). Plaintiffs also allege that all Defendants entered into a conspiracy to blacklist them by transmitting false information by oral and written means (Paragraph VII).

Plaintiffs' allegations against City Electric cannot be sustained as a matter of law, and City Electric

accordingly has moved for summary judgment. Several grounds exist for this assertion, and they will be treated separately. The separate grounds advanced should be considered by this Court as alternative grounds for a grant of summary judgment.

III. LAW ON SUMMARY JUDGMENT

Summary judgment is controlled by Rule 56, M.R.Civ.P., and subdivision (c) of that Rule requires entry of judgment on behalf of the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." See, e.g., Cereck v. Albertson's, Inc., ___ Mont. ___, 637 P.2d 509, 510-511 (1981). If the items outlined above demonstrate that there is no genuine issue as to any material

fact, the party opposing the motion has the burden of showing evidence of a material nature raising the genuine issue of fact. See, e.g., Dewinter v. Capp Homes, Inc., 162 Mont. 19, 509 P.2d 1061, 1063-64 (1973).

IV. BLACKLISTING

Plaintiffs' allegations of blacklisting against City Electric cannot be maintained as a matter of law.

Blacklisting is the practice by a former employer of preventing a former employee from obtaining employment. Montana law provides a statutory prohibition against blacklisting. MCA §§39-2-801 to 804. The clear, unambiguous language of the statutes prevents an employer from engaging in this practice against a former employee. An employment relationship must exist in Montana to substantiate a claim of blacklisting.

"Employment" is defined in Title 39 as follows:

> "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."

MCA §39-2-101.

The uncontroverted facts relating these statutes to the case at bar are:

1. Malquist and Belt have never been employees of City Electric.

2. Boharski had worked for City Electric prior to 1980, but did not attempt to be employed with City Electric in connection with Champion's Frenchtown project in 1980 (see Exhibit "A").

Although the Montana Supreme Court has not interpreted the blacklisting statutes, their language and import are clear. First, an employment relationship must exist before

blacklisting charges can be pursued legally. Second, the statutory prohibition against blacklisting is directed only to a former employer, not to a prospective employer. Because no employer-employee relationship existed between Plaintiffs and City Electric in connection with this project, the allegations of blacklisting cannot lie with this project, the allegations of blacklisting cannot lie against City Electric.

Courts interpreting similar blacklisting statutes have uniformly held that an employment relationship must have existed to sustain charges of blacklisting against a former employer. See, e.g., Hertzka & Knowles v. NLRB, 503 P.2d 625 (9th Cir, [sic] 1974); Choltes v. Signal Delivery Service, Inc., 548 F.Supp. 487 (W.D. Ark. 1982).

Plaintiffs also allege a conspiracy among the Defendants to communicate false and misleading information by telephone and written messages to potential employers. When asked to identify the telephone and written messages and witnesses thereto constituting blacklisting, Plaintiffs could not identify these messages or any witnesses to the fact that they occurred (Plaintiffs' Answers to City Electric's Interrogatories, Exhibit "B" attached hereto and incorporated by reference). The only documentary evidence upon which Plaintiffs apparently rely are two letters written by Foley's counsel to the NLRB (Exhibit "B", Attachment 1). As this Court can readily determine, these letters do not involve any conduct by City Electric.

In Montana, blacklisting can only be charged against a former employer and not against any purported prospective employer. The evidence is uncontradicted that Plaintiffs were never employed by City Electric in connection with Champion's Frenchtown project. Plaintiffs have further failed in their proof that City Electric had any involvement in the alleged transmission of blacklisting information.

V. STATUTE OF LIMITATIONS

No statute of limitations is prescribed by the blacklisting statutes cited above. This Defendant asserts that blacklisting constitutes an "unfair labor practice". When unfair labor practices involving public employees are asserted, a six-month statute of limitations applies. MCA §39-31-404.

By analogy, that same six-month statute of limitations should apply in the case at bar. The alleged unfair labor practices took place in August or September of 1980. The instant action was not filed until February, 1982. Thus, Plaintiffs' actions are barred by the appropriate six-month statute of limitations under Montana law.

VI. RIGHT OF REJECTION OF PROSPECTIVE EMPLOYEES

The labor agreement which governed the labor relationships between Plaintiffs as members of Local 768, IBEW, and City Electric, provided in part: "The employer shall have the right to reject any applicant for employment." (Exhibit "B" to Payne's Brief in Support of Motion for Summary Judgment, Article VI, P. 28).

The Affidavit of Jerry Jacobson, Exhibit "A" attached hereto, establishes that Belt and Malquist were both rejected by City Electric when they presented themselves for employment. Boharski did not report to City Electric for employment in connection with the alleged incident.

Plaintiffs' Complaint is not clear as to whether any claims are being asserted for City Electric's refusal to hire Belt and Malquist. Certainly, no claim can be made that City Electric's rejection was wrongful, as the right to reject was a negotiated component of the labor agreement between Local 768, IBEW, and local electrical contractors like City Electric. Nor can the right of refusal form any basis of the allegations of blacklisting, as this clearly requires an employment relationship, and

Belt and Malquist were never hired by City Electric.

VII. FEDERAL LABOR LAW REQUIRES DISMISSAL OF THIS ACTION

Plaintiffs' allegations are couched in terms of the violations of Montana's blacklisting law. A close analysis of Plaintiffs' Complaint reveals, however, that Plaintiffs are complaining of alleged violations of federal labor law, specifically, unfair labor practices defined in 29 USC §158. Federal labor law preempts any applicable state law in the area of labor relations arising out of collective bargaining agreements. See, e.g., Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). An analysis of federal labor law applicable to Plaintiffs' allegations reveals that Plaintiffs' action must be dismissed by this Court as to City Electric.

A. Subject Matter Jurisdiction

The labor relations between Plaintiffs and Defendants were governed by the collective bargaining agreement between Local 768, IBEW and Defendant electrical contractors. These labor relations are subject to the National Labor Relations Acts, (NLRA) 29 USC §141, et. seq. Allegations of unfair labor practices must be brought before the NLRB prior to appealing an NLRB decision to a Federal Court of Appeals. 29 USC §160; San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The only exception to this jurisdictional requirement is if the NLRB formally declines to accept jurisdiction. 29 USC §164.

This state court lacks subject matter jurisdiction over labor matter disputes arising under the NLRA.

There is no evidence in the record that the NLRB has issued a declination of jurisdiction. Further, Plaintiffs have admitted that they did not bring an action before the NLRB concerning their allegations against these Defendants (Exhibit "B", Interrogatory No. 12).

B. Failure to Exhaust Contractual Remedies

The labor agreement between Local 768, IBEW, and the Defendant electrical contractors provided an administrative mechanism for resolving labor disputes in the form of grievance and arbitration proceedings. The Affidavit of Jerry Jacobson, Exhibit "A", establishes that no grievance or arbitration proceedings were initiated by the Plaintiffs concerning the events alleged in their Complaint. Having failed to exhaust their contractual

remedies, Plaintiffs are barred from pursuing this action in court. See, e.g., Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

The rule requiring exhaustion of contractual remedies is particularly applicable to the requirement of arbitration. Arbitration is favored, United Steel Workers v. Warrior & Golf Navigation Co., 363 U.S. 574, 582-83 (1960), and there must be strict adherence to arbitration agreements. Huntington Alloys v. United Steel Workers of America, 623 P.2d 335, 338 (4th Cir. 1980).

C. Statute of Limitations

Plaintiffs' claims under federal law are barred by the applicable statute of limitations under the NLRA. The United States Supreme Court has recently held that actions alleging unfair labor practices are governed by

the six-month statute of limitations found in the NLRA, 29 USC §160(b). Delcostello v. International Brotherhood of Teamsters, ___ U.S. ___, 76 L.Ed.2d 476 (1983). The Supreme Court determined that this federal statute of limitations preempts any applicable state statute of limitations.

Since the alleged unfair labor practices took place in August or September, 1980, and this action was not brought until February, 1982, Plaintiffs' Complaint is barred by the six-month statute of limitations.

VIII. CONCLUSION

For the foregoing reasons advanced, this Defendant respectfully

requests this Court to dismiss Plaintiffs' Complaint against City Electric.

DATED this 17th day of April, 1984.

Respectfully submitted,

CORETTE SMITH POHLMAN & ALLEN

By GREGORY C. BLACK
Attorneys for Defendant, City Electric
P. O. Box 509
Butte, Montana 59703

IN THE DISTRICT COURT OF THE

FOURTH JUDICIAL DISTRICT OF THE

STATE OF MONTANA, IN AND FOR

THE COUNTY OF MISSOULA

No. 55390

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,

Plaintiffs,

-vs-

HOWARD P. FOLEY COMPANY, a District of Columbia corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,

Defendants.

AFFIDAVIT OF JERRY JACOBSON

STATE OF MONTANA)
: ss
County of Missoula)

JERRY JACOBSON, being first duly sworn upon oath, deposes and says:

1. That he is the President and majority shareholder of City Electric, a Montana corporation.

2. That he contracted with Champion International to provide electrical services for work to be performed in 1980 at the Champion Packaging Plant, near Frenchtown, Montana.

3. That his company was a member of the Kalispell Division, Montana Chapter of the NECA, and was bound by the agreement between said NECA chapter and IBEW Local Union No. 768.

4. That pursuant to said agreement, all potential electricians to be hired by City Electric were to be referred by IBEW Local No. 768, and that said union agreement allowed City Electric to reject any applicants for employment without providing the applicants with a reason for rejection.

5. That Dale Malquist and George Belt are not now nor have they ever been employees of City Electric.

6. That George Boharski worked for City Electric sometime prior to 1980, but was not an employee of City Electric on or shortly before August 26, 1980.

7. That only Dale Malquist and George Belt reported to City Electric as prospective electricians and that neither Malquist nor Belt were accepted for employment by City Electric, and no reasons were given to Malquist or Belt for not being hired.

8. That neither he nor any employees or agents of City Electric have ever communicated by telephone, written message or any other means to any other companies or electrical contractors that Malquist, Belt or Boharski were not to be employed.

9. That neither he nor any agents or employees of City Electric have ever transmitted any false or

misleading information to other electrical contractors as to the reasons Malquist, Belt or Boharski were not to be employed.

10. That no grievance was filed against City Electric by Belt, Boharski or Malquist concerning the events alleged in their Complaint.

11. That no arbitration proceedings were had involving City Electric, Malquist, Belt or Boharski concerning the allegations in their Complaint.

FURTHER AFFIANT SAYETH NOT.

s/
Jerry Jacobson

SUBSCRIBED AND SWORN TO before me this 27th day of March, 1984.

s/
Notary Public for the State of Montana
Residing at Missoula, Montana
My commission expires: 8-30-86

(SEAL)

APPENDIX "E"

IN THE DISTRICT COURT OF THE

FOURTH JUDICIAL DISTRICT OF THE

STATE OF MONTANA, IN AND FOR

THE COUNTY OF MISSOULA

No. 55390

DALE MALQUIST, GEORGE BOHARSKI, GEORGE BELT and LOCAL 768, IBEW,

Plaintiffs,

-vs-

HOWARD P. FOLEY COMPANY, a District of Columbia corporation, CITY ELECTRIC, a Montana corporation, and R. L. PAYNE COMPANY, INC., a Montana corporation,

Defendants.

COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiffs, for their cause of action against the defendants, allege as follows:

I.

Plaintiffs Dale Malquist, George Boharski and George Belt, hereinafter

designated as Malquist, Boharski and Belt, are residents of the State of Montana, and were and are members in good standing with plaintiff Local 768, IBEW, hereinafter designated Local 768;

III. [sic]

At all times herein and pertinent hereto, Malquist, Boharski and Belt were employed by the plaintiffs through the hiring procedures established between the plaintiffs and plaintiff Local 768, IBEW;

IV.

Defendant Howard P. Foley Company is a corporation organized and existing under the laws of the District of Columbia for the purposes of provideing [sic] electrical contracting services to various customers; Defendants City Electric and R.L.Payne [sic] Co., Inc, [sic] are corporations organized

and existing under the laws of the state of Montana for the purposes of providing electrical contracting services to various customers;

IV. [sic]

At all times herein plaintiffs are and were members of the IBEW Local 768 collective bargaining negotiating team with Local 768's employer group or job stewards;

V.

On or about September 1, 1980, and thereafter, the plaintiffs were employed by MM&R in their capacities as skilled electricians and wholly qualified to perform all work of electricians on the "Champion Project" of which said MM&R was a subcontractor;

VI.

That the work and responsibilities of MM&R was taken over by defendant Howard P. Foley Company when

MM&R's general contractor was terminated from the project; that said defendant Howard P. Foley Company refused to continue the employment of the plaintiffs, and each of them, for the reason that said defendant wilfully and maliciously blacklisted plaintiffs with itself and the other defendants named herein, by telephoning, circulating a written list or otherwise transmitting the names of the plaintiffs among themselves for the sole purpose of ensuring that the plaintiffs would not be employed in their trade and skill as electricians in this area;

VII.

That the defendants conspired to and blacklisted these plaintiffs by advising among themselves and others not to hire plaintiffs, and transmitting false and misleading information

as to the reasons that the plaintiffs were not retained for employment;

VIII.

By reason of such deliberate and wilfull conduct on the part of the defendants, plaintiffs have been prevented from obtaining employment as skilled electricians in positions commanding the high level of compensation commensurate with plaintiffs' abilities and experience, and have further been prevented from obtaining any employment for long periods of time in the area governed by Local 768 IBEW;

IX.

As a proximate result of the foregoing, plaintiffs have suffered loss of wages in an aggregate and substantial amount. Plaintiff [sic] have further suffered, as a proximate result of defendants' actions, anguish, humiliation and mental suffering

because of their prolonged unemployment;

X.

Defendants have, by using a "blacklist" or "no-hire" list, subjected themselves to punitive damages pursuant to state law; that these plaintiffs make claim to such punitive damages pursuant to said state law;

WHEREFORE, Plaintiffs seek a judgment against these defendants as follows:

1. For an award of their lost wages;

2. For an award to plaintiffs of damages for humiliation, mental suffering and harm to their reputations as electricians;

3. For an award of all costs incurred herein;

4. For an award of punitive damages;

5. For such other and further relief as to this Court seems just.

Dated February 5, 1982.

TERRY A. WALLACE

s/
Attorney for Plaintiffs
119 Mount Avenue
Missoula, Montana 59801

DEMAND FOR JURY TRIAL

These plaintiffs hereby demand a jury trial on each and every issue of fact raised in this lawsuit.

Supreme Court, U.S.
FILED
NOV 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-72

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

R. L. PAYNE CO.,
Petitioner,

v.

DALE MALQUIST, *et al.*,
Respondent,

On Petition for a Writ of Certiorari to the Supreme Court of Montana

---

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of Montana

---

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The opinions below, the basis for invoking this Court's jurisdiction, and the constitutional and statutory provisions involved are set forth in the Petition for a Writ of Certiorari at 3-4 and Appendix A and are therefore not reprinted here as well.

COUNTERSTATEMENT OF THE CASE

From March until August of 1980, Dale Malquist, George Boharski, and George Belt, plaintiffs below and respondents herein, were employed by an electrical contractor to do construction work at a packaging plant in

Missoula County, Montana. In August 1980, that contractor was terminated from the construction project and replaced by another contractor, defendant Howard P. Foley Company, who proceeded to subcontract certain electrical work to defendant R. L. Payne Company, petitioner herein, and to defendant City Electric.

The defendants were all signatories to a collective bargaining agreement with respondent Local 768 of the International Brotherhood of Electrical Workers ("the Union"). In accordance with that agreement, defendants requested the Union to refer electricians from the Union's hiring hall to work on the construction project. The Union referred, among others, the three plaintiffs, but defendants refused to hire them.

In September 1980, the Union met with the defendants and asked for a copy of "Foley's blacklist." In response, the Union was shown a list of individuals, including plaintiffs, who would not be hired for the construction project. No reason was given by defendants for their refusal to hire these individuals.

The Union filed an unfair labor practice charge with the National Labor Relations Board against general contractor Foley, alleging that Foley's actions were discriminatorily motivated in violation of § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) ("NLRA" or "the Act"). By letter dated November 25, 1980, the Regional Director of the Board, following an investigation, informed the Union that he would not issue a complaint because his investigation "revealed no evidence" to support the charge of anti-union animus.[1]

On February 5, 1982, plaintiffs filed the instant lawsuit in Montana state court against Foley and the two subcontractors, City Electric and petitioner Payne. The complaint alleged, in pertinent part, that Foley had

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[1] The Regional Director's letter is reprinted as an appendix to this Brief.

> wilfully and maliciously blacklisted plaintiffs with itself and the other defendants named herein by telephoning, circulating a written list or otherwise transmitting the names of the plaintiffs among themselves for the sole purpose of ensuring that the plaintiffs would not be employed in their trade and skill as electricians in this area. [Pet. App. E-4]

The complaint further alleged that "the defendants conspired to and blacklisted these plaintiffs by advising among themselves and others not to hire plaintiffs, and transmitting false and misleading information as to the reasons that plaintiffs were not retained for employment," and that as a result of defendants' actions, plaintiffs were "prevented from obtaining any employment for long periods of time in the Missoula area." *Id.* E-4 to E-5. Plaintiffs sought compensation for their lost wages and for the "anguish, humiliation and mental suffering [caused by] the prolonged unemployment"; plaintiffs also sought punitive damages pursuant to the Montana anti-blacklisting law, § 39-2-803, which provides that any person who:

> does blacklist any discharged employee or attempts by word or writing or any other means to prevent any discharged employee or any employee who may have voluntarily left the company's service from obtaining employment with another person . . . is liable in punitive damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action.[2]

Petitioner moved for summary judgment, principally on the ground that, as a matter of state law, plaintiffs'

---

[2] The prohibition quoted in text is subject to the following statutory qualification, stated in § 39-2-802, MCA, and incorporated by reference in the anti-blacklisting section quoted in text:

> No person is prohibited from informing by word or writing any person to whom such discharged person or employee has applied for employment a truthful statement of the reasons for such discharge.

complaint failed to state a valid claim for relief under the Montana anti-blacklisting law or under Montana tort law. In addition to raising state-law issues, petitioner's summary judgment motion briefly asserted that plaintiffs' complaint was preempted by the NLRA. *See* Pet. App. D-26 to D-27. On September 12, 1984, the Montana District Court for the Fourth Judicial District granted petitioner's motion, ruling that plaintiffs' complaint is preempted by the federal labor law. Pet. App. C.

Plaintiffs appealed to the Montana Supreme Court which on February 13, 1986, reversed the trial court's decision and remanded the case for trial. The Montana Supreme Court concluded that under Montana law, "blacklisting itself constitutes tortious conduct giving rise to a civil remedy." Pet. App. B-18. And that court held that "[t]he conduct complained of is . . . not subject to NLRA proscription," and therefore "federal preemption does not exist," *id.* B-18, since "[n]o one in this litigation contends that plaintiffs were blacklisted for labor-related activities," *id.* B-13, and since "[b]lacklisting *for any purpose* is unlawful in Montana," *id.* B-12 (emphasis added).

ARGUMENT

As this Court observed in *Longshoremen v. Davis*, —— U.S. ——, 54 L.W. 4512, 4513, 4515 (May 27, 1986), the rules for determining when a state-law cause of action is preempted by the National Labor Relations Act are by "now well-established" and have been "reiterated many times" and "applied in a multitude of cases" in the more than twenty-five years since *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), was decided.

This case involves nothing more than the application of these settled principles to a particular factual context. Petitioner has not identified a single other case that has arisen since *Garmon* involving the specific state-law cause of action at issue in this case. Thus, this case does

not present the kind of important, recurring unsettled questions of law this Court sits to hear.

Nor is the issuance of a writ of certiorari justified on the theory that the court below deviated from this Court's teachings. To the contrary, as we show below, the holding of the Montana Supreme Court that the Montana tort of blacklisting is not preempted either in general or in this case accords with the principles stated in *Garmon* and is compelled by several recent decisions of this Court.

A. The starting point for analysis is the recognition that in enacting the NLRA, Congress did not "intend[] to disturb the myriad state laws . . . that set minimum labor conditions but [are] unrelated in any way to the processes of bargaining or self-organization." *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 53 L.W. 4146, 4625 (June 3, 1985). Rather, as this Court has concluded:

> Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety . . . "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." . . .
>
> Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act . . . When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act. [*Id.*]

The Montana anti-blacklisting law, from which the Montana Supreme Court implied a cause of action in tort,

is plainly a law enacted by the State "to protect workers within the State" by establishing "a minimal employment standard." *Metropolitan Life, supra.* That law reflects the Montana legislature's judgment that employees who are discharged or who voluntarily leave their employment should be afforded certain legal protections from attempts by former employers to prevent such employees from obtaining other employment. That legislative judgment is surely "not inconsistent with the general legislative goals of the NLRA," *Metropolitan Life, supra*; affording employees protection from blacklisting in no way retards the attempts of the NLRA to redress the "inequality of bargaining power [and] the resultant depressed wage rates" that Congress found to exist where employees are prevented from organizing and engaging in collective action, *id.* at 4624. Thus, *Metropolitan Life* permits the states to enact and enforce a law like the Montana anti-blacklisting statute.

B. Although as the Montana Supreme Court observed, "[n]o one in this litigation contends that plaintiffs were blacklisted for labor-related activities," Pet. App. E-13, petitioner nonetheless attempts to transform this case into one in which the blacklisting arguably violated § 8(a)(3), and on that basis petitioner contends that the decision below upholding state jurisdiction here is inconsistent with *Garmon* and worthy of this Court's review. As we proceed to show, petitioner's argument flies in the face of this Court's decisions in two separate and independent respects.

1. *Garmon* states the general rule that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board . . ." 359 U.S. at 245. This Court's cases "indicate, however, that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the state's interest is one that does

not threaten undue interference with the federal regulatory scheme." *Farmer v. Carpenters*, 430 U.S. 290, 302 (1977). Thus,

> "the decision to preempt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies" of permitting the state court to proceed. [*Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 189 (1978)]

Sears illustrates the type of "careful consideration of . . . the various interests affected," *id.* at 188, that is required to decide whether a state-law claim is preempted. That case arose out of union picketing to protest the employer's use of nonunion labor to perform certain construction work for the employer. The employer sought an injunction against the picketing in state court on the ground that the situs of the picketing invaded the employer's (state-law) property rights and thus was tresspatory. The question posed was whether Sears' trespass claim was preempted by the NLRA.

This Court answered that question in the negative, ruling that the state courts were free to entertain the employer's claim. In reaching this conclusion the Court accepted as a "premise . . . that the picketing was . . . arguably prohibited . . . by federal law." *Id.* at 187.[3] That was true, the Court explained because

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[3] The Court in *Sears* also assumed that the picketing was "arguably protected by federal law," 436 U.S. at 187, and in a separate portion of its opinion, the Court declined to "preempt[] state jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so." *Id.* at 202-03.

This portion of *Sears* is not relevant here because blacklisting is not, on any theory, arguably protected by the NLRA. Section 8(c) of the NLRA, 29 U.S.C. § 158(c), on which petitioner relies, provides merely that "[t]he expressing of any views, argument or

> [i]f an object of the picketing was to force Sears into assigning the carpentry work away from its employees to Union members dispatched from the hiring hall, the picketing may have been prohibited by § 8(b)(4)(D). Alternatively, if an object of the picketing was to coerce Sears into signing a prehire or members-only type agreement with the Union, the picketing was at least arguably subject to the prohibition on recognitional picketing contained in § 8(b)(7)(C). [*Id.* at 185-86]

Even though the union's picketing was arguably prohibited by the NLRA, the *Sears* Court nonetheless concluded that "[t]he reasons why preemption of state jurisdiction is normally appropriate when union activity is arguably prohibited by federal law plainly do not apply to this situation." *Id.* at 198:

> In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work-reassignment objective . . . Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. [*Id.*]

That being so, the Court drew the following conclusion:

> Accordingly, permitting the state court to adjudicate Sears' trespass claim would create *no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices.* [*Id.*; emphasis added].

See also Belknap v. Hale, 463 U.S. 491, 510 (1983).

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opinion . . . shall not constitute or be evidence of any unfair labor practice"; that section does *not* extend affirmative protection to such expressions so as to oust state-court jurisdiction over tort claims which turn on expressions by employers or unions. *See, e.g., Linn v. Plant Guard Workers*, 387 U.S. 53 (1966); *Belknap v. Hale*, 463 U.S. 491 (1983)).

The instant case is analytically indistinguishable from *Sears*. None of the interests safeguarded by § 8 of the NLRA is implicated by an anti-blacklisting prohibition unless the employer selects employees for blacklisting *on a basis proscribed by the NLRA;* thus here, as in *Sears*, the employers' "purposes [would] be of critical importance" to any unfair labor practice charge.[4] But as the Montana Supreme Court repeatedly stressed:

> The conduct proscribed by the state statute is "blacklisting" *per se*. There is no requirement that blacklisting be related to an unfair labor practice. *If an employer blacklists an employee for any reasons, that employer is subject to liability under § 39-2-803, MCA.* [Pet. App. B-11; emphasis added.] [5]

Thus, just as the union's objective in *Sears* in conducting the picketing was "irrelevant to the state claim," so, too, under Montana law, the issue of the employer's motivation is entirely irrelevant to the tort of blacklisting. Proof of an anti-union motive would not be part of the plaintiffs' case nor would such proof provide the employer with a defense. Accordingly, here, as in *Sears*, "permitting the state court to adjudicate [plaintiffs' blacklisting] claim would create no realistic risk of interference with the Labor Board's primary jurisdiction." And the fact that the NLRA may provide a remedy for blacklisting motivated by anti-union animus cannot suffice to oust state jurisdiction over the tort of blacklisting as that tort is defined in Montana, any more than the existance of an NLRA remedy with respect to picketing

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[4] The cases on which petitioner relies to support the proposition that "blacklisting is recognized as an unfair labor practice," Pet. at 22-23, all involve blacklisting predicated on *anti-union animus.*

[5] *See also id.* B-12 ("Blacklisting for any purpose is unlawful in Montana"); *id.* at B-17 ("Blacklisting *per se* is proscribed in Montana").

which seeks to achieve certain objectives defeated state jurisdiction over the trespass claim in *Sears*.

2. Our showing, thus far, establishes that because the issue of motivation is irrelevant as a matter of state law to the tort of blacklisting, that tort is not preempted regardless of what may have motivated an employer to engage in blacklisting in a particular case. But even if, contrary to what we have just shown, the state courts were preempted from entertaining a blacklisting claim in circumstances in which the employer's conduct was arguably motivated by anti-union animus, the Montana Supreme Court's decision sustaining state-court jurisdiction in the instant case still would not raise a question worthy of this Court's attention. For as the Montana Court observed, "No one in this litigation contends that plaintiffs were blacklisted for labor-related activities." Pet. App. B-13. And under this Court's decision last Term in *Longshoremen v. Davis*, *supra*, petitioner's speculation that the blacklisting may have violated § 8(a)(3) would not suffice to justify a preemption ruling here, even assuming *arguendo* that a blacklisting claim could be preempted based on the circumstances of a particular case.

Davis was a misrepresentation case in which the plaintiff claimed that he had been advised by the defendant-union that he could not be lawfully discharged for engaging in union activity; that advice was false if, as he contended, plaintiff was a "supervisor" within the meaning of the NLRA. The Court recognized that, under *Garmon*, if (as the union claimed) the plaintiff "was arguably an employee, rather than a supervisor," the issue of the plaintiff's legal status "was to be initially decided by the NLRB, not the state court." 54 L.W. at 4516. But the Court nonetheless held that the plaintiff's claim was not preempted because the Union failed to "carry the burden of showing at least an arguable case." *Id.* at 4517. The Court explained:

> The precondition for preemption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim, without more, that [plaintiff] was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board. *The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.* [*Id.* at 4516; emphasis added]

Similarly, in this case, petitioner has failed to "put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act." *Davis*, 54 L.W. at 5417. Petitioner did not present any evidence below, and has not offered any evidence here, to suggest an arguable case of anti-union motivation. Indeed, petitioner has steadfastly denied the existence of any such evidence. And the Regional Director of the NLRB found "no evidence" of anti-union motivation in his investigation. P. 2 *supra*. Thus, even if state-court jurisdiction over the tort of blacklisting could be defeated by evidence of an anti-union motivation for the blacklisting—evidence that would be of no legal relevance to the tort claim—petitioner still "has not met its burden of showing that the conduct here was arguably subject to the Act." *Id.*

C. One final point needs to be made. If, in the trial of a particular blacklisting claim, a plaintiff were to attempt to use evidence of the plaintiff's union activities and of the employer's anti-union animus to lend credence to the plaintiff's claim that the employer had, in fact, blacklisted the plaintiff, there would be a substantial risk

that the fact-finder would invade the province of the NLRB in deciding the state-law issue. For that reason, we believe this Court's admonition in *Farmer* is fully applicable to blacklisting cases as well: "In view of the potential for interference with the federal scheme of regulation, the trial court should be sensitive to the need to minimize the jury's exposure to evidence of employment discrimination in cases of this sort." 430 U.S. at 305 n.13.

Unlike *Farmer*, however—which came to this Court following a full trial in state-court—the instant case is presently in an *interlocutory* posture. Consequently, the only issue raised here is whether the plaintiff's complaint, *on its face*, states a claim within the jurisdiction of the state courts. And, as shown above, *Metropolitan Life*, *Sears*, and *Davis* each independently compels the conclusion that the Montana Supreme Court answered that question correctly in upholding state-court jurisdiction over plaintiffs' tort claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

[SEAL]

NATIONAL LABOR RELATIONS BOARD
REGION 19
29th Floor, Federal Building, 915 Second Avenue
Seattle, Washington 98174

November 25, 1980

Telephone (206) 442-4532

Reg McMurdo, Business Manager
International Brotherhood of
Electrical Workers, Local 768
208 East Main
Missoula, MT 59801

Re: H. P. Foley Company
Case No. 19-CA-12861

Dear Mr. McMurdo:

The above-captioned case (x), charging violations under Section 8 of the National Labor Relations Act, as amended, has (xxxx) been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter. A written summary report of the basis for my conclusions is attached.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570 and a copy with me. This appeal

must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on December 8, 1980. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with me within the time stated above.

Very truly yours,

CHARLES M. HENDERSON
Regional Director

Enclosures

Certified Mail No. 909895
Return receipt requested

cc: General Counsel, Attention: Office of Appeals, National Labor Relations Board, 1717 Pennsylvania Ave. N.W., Washington, D.C. 20570

Ronald F. Sysak, Attorney, Third Floor Mony Plaza, 424 East 5th South, Salt Lake City, UT 84111

H. P. Foley Company, Champion International Expansion Project, Frenchtown, MT 59834

Case No. 19-CA-12861 November 25, 1980

SUMMARY REPORT

The investigation revealed no evidence to show that H. P. Foley, the Employer, refused to hire Dale Malquist because of his activity as a union steward while employed at the construction site by another firm which was performing electrical contracting work before the Employer took over the job.